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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 56

GERALD WILLIAM NELSON AND JOHN E. HATTON,
PETITIONERS,

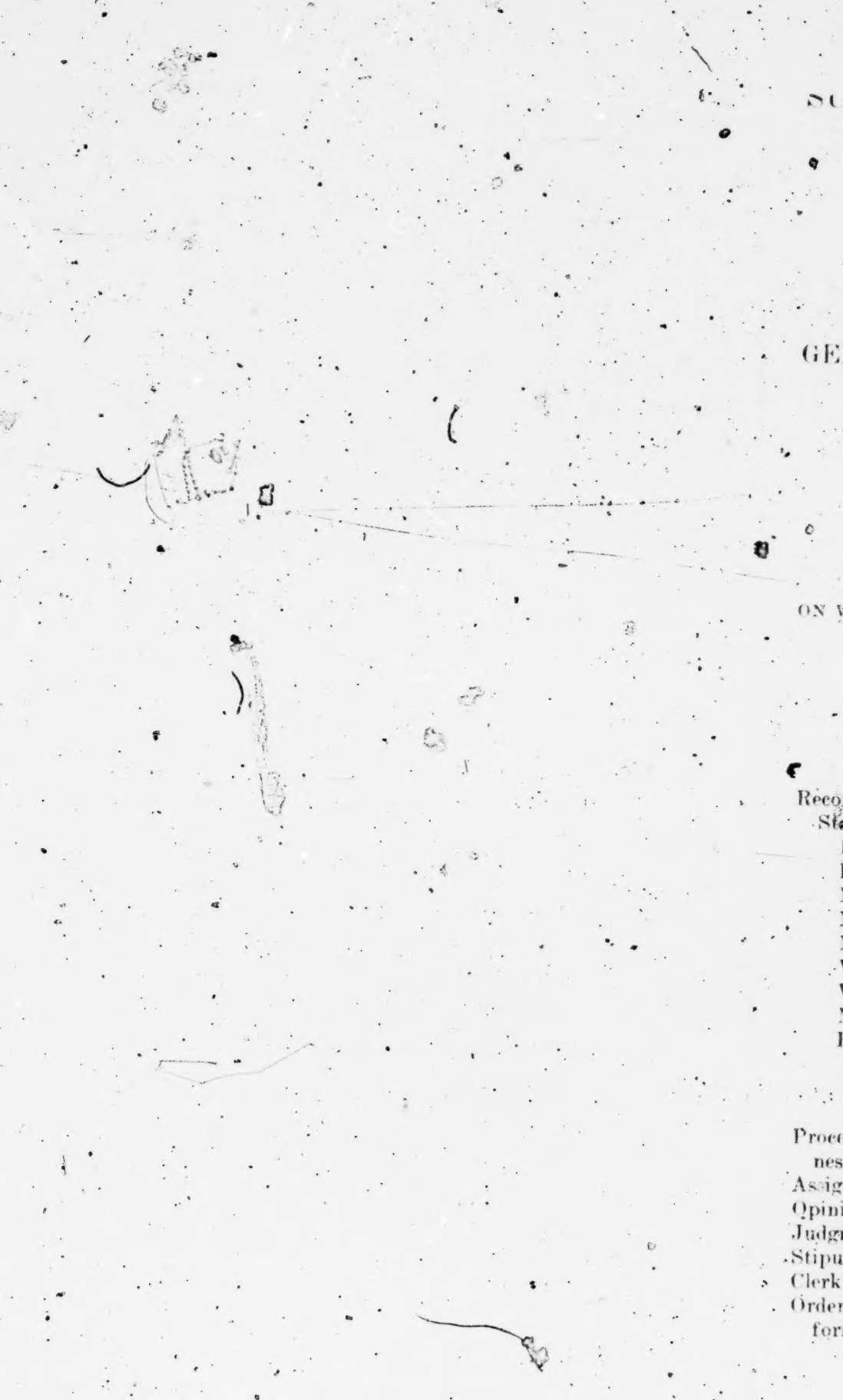
vs.

STATE OF TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1956

CERTIORARI GRANTED DECEMBER 17, 1956



PREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 56

ALD WILLIAM NELSON AND JOHN E. HATTON,
PETITIONERS,

v.

STATE OF TENNESSEE

RIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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IN THE CRIMINAL COURT OF KNOX COUNTY OF THE STATE OF TENNESSEE

Court met pursuant to adjournment, present and presiding the Honorable J. Fred Bibb, Judge of the Criminal Court for Knox County, when the following proceedings were had and entered of record to-wit:

INDICTMENT—MAY 18, 1955

No. 2206

THE STATE

vs.

GERALD WILLIAM NELSON ALIAS JACK NELSON ALIAS and JOHN E. HATTON and GARNEL LEE CRAIG.

Felony.

Mildred Doyle, Prosecutor.

Witness: Mildred Doyle, County Superintendent, W. H. Marshall, Southern Bell Tel. Co., Fred Adcock 5503 Lakeshire Drive 7-4485, James F. Hardy, C. R. Hollingsworth 9027, 5418 W. Colonial Circle, A. W. Coleman, 301 Grata Road, 2-09754 (Look on inside) Witnesses: Curtis Shoemaker, 504 Marchant Rd. 6-2620, W. B. Allen, Route 7, Middlebrook Pike 8-1740, John T. Reynolds, T.B.I. Ph 129 Morriwtown, Austin Cate, Sheriff, Estel Wrinkle, E. W. Young, Deputy Sheriffs, Theo Lyle, Pat Patterson, County Detectives T. Mack Blackburn, R. D. Longmire Dist. Attorney's Office, George Ireland City Police Britt B. Beal McCuggin Rd. 306802, Shester Atchley Burlington Texaco Station, R. L. Foster, 1318 Grainger 302859, Imogene Freeman, 4436 Holston Drive. Clerk: Summon above named witnesses for the State. Hal H. Clements, Jr., District Attorney General. Witnesses sworn by me in presence of the Grand Jury, May 17, 1955, Virgil Graves, Foreman of the Grand Jury. Filed 18 day of May, 1955, Tolbert F. Taylor, Clerk. A True Bill. Virgil Graves, Foreman of the Grand Jury.

STATE OF TENNESSEE, COUNTY OF KNOX;

Criminal Court for Knox County, March Term, 1955:

The Grand Jurors for the State of Tennessee, upon their oaths present that Gerald William Nelson alias Jack Nelson, alias and John E. Hatton and Garnel Lee Craig heretofore, to-wit: On the —— day of May, 1955, in the State and County aforesaid, unlawfully and feloniously did wilfully and maliciously damage and destroy real property of Knox County, Tennessee, to-wit: The Chilhowee School, [fol. 3] by the use of dynamite and other explosives, contrary to the Statute and against the peace and dignity of the State.

Second Count

And the Grand Jurors for the State of Tennessee, upon their oaths, do further present that: Garnell Lee Craig, heretofore, to-wit: On the —— day of May, 1955, in the State and County aforesaid, unlawfully, was an accessory before the fact in the commission of a felony: that is to say, that the said defendant did feloniously move, incite, counsel, hire, command and procure Gerald William Nelson Alias Jack Nelson alias and John E. Hatton to wilfully and maliciously damage and destroy real property of Knox County, Tennessee, to-wit: The Chilhowee School, by the use of dynamite and other explosives, contrary to the Statute and against the peace and dignity of the State.

Third Count

And the Grand Jurors for the State of Tennessee, upon their oaths, do further present that: Gerald William Nelson, alias Jack Nelson alias and John E. Hattor and Garnel Lee Craig, heretofore, to-wit: On the —— day of May, 1955, in the State and County aforesaid, unlawfully, wilfully and maliciously did damage and destroy real property of the Southern Bell Telephone Company, A corporation, said property being a cross-connecting termain-l and located on the Chilhowee Road in Knox County, Tennessee, by the use of dynamite and other explosives, contrary to the Statute and against the peace and dignity of the State.

Fourth County

And the Grand Jurors for the State of Tennessee, upon their oaths, present that Garnel Lee Craig heretofore,

to-wit: On the —— day of May, 1955, in the State and County aforesaid, unlawfully, was an accessory before the fact in the commission of a felony; that is to say, that the said defendant did feloniously move, incite, counsel, hire, command and procure Gerald William Nelson alias Jack Nelson alias and John E. Hatton to wilfully and maliciously damage and destroy the real property of the Southern Bell Telephone Company, a Corporation, by the use of dynamite and other explosives, said real property being a cross-connecting terminal located on the Chilhowee Road in Knox County, Tennessee, contrary to the Statute and against the peace and dignity of the State.

[fol. 4]

Fifth Count

And the Grand Jurors for the State of Tennessee, upon their oaths do further present that: Gerald William Nelson alias Jack Nelson alias and John E. Hatton and Garnel Lee Craig, heretofore, to-wit: On the —— day of May, 1955, in the State and County aforesaid, unlawfully, wilfully and maliciously did damage and destroy the personal property of the Southern Bell Telephone Company, a Corporation, said personal property being a cross-connecting terminal of the value of $395.00, the further description thereof to the Grand Jurors unknown, and damaged and destroyed to the extent of $390.00 by the use of dynamite and other explosives, said personal property being located on the Chilhowee Road in Knox County, Tennessee, contrary to the Statute and against the peace and dignity of the State.

Sixth Count

And the Grand Jurors for the State of Tennessee, upon their oaths, do further present that: Gernel Lee Craig, heretofore, to-wit: On the —— day of May, 1955, in the State and County aforesaid, unlawfully, was an accessory before the fact in the commission of a crime and a felony; that is to say, that the said defendant did feloniously move, incite, counsel, hire, command and procure Gerald William Nelson alias Jack Nelson alias and John E. Hatton to wilfully and maliciously damage and destroy personal property of the Southern Bell Telephone Company, a Corporation, by the use of dynamite and other explosives, said personal property being a cross-connecting terminal of the

[fol. 5] value of $395.00, the further description thereof to the Grand Jurors unknown, and being damaged and destroyed to the extent of $390.00, of the total value of said cross-connecting terminal, which said personal property was located on the Chilhowee Road in Knox County, Tennessee, contrary to the Statute and against the peace and dignity of the State.

Hal H. Clements, Jr. (S), Attorney General.

Court Adjourned until Tomorrow Morning at — O'Clock.

(Signed) J. Fred Bibb, Judge.

[fol. 6] IN THE CRIMINAL COURT OF KNOX COUNTY

Court met pursuant to adjournment, present and presiding the Honorable J. Fred Bibb, Judge of the Criminal Court for Knox County, when the following proceedings were had and entered of record, to-wit:

INDICTMENT—May 18, 1955

No. 2205

THE STATE

vs.

GERALD WILLIAM NELSON ALIAS JACK NELSON ALIAS and JOHN E. HATTON and GARNEL LEE CRAIG

Felony.

Austin Cate, Sheriff, Prosecutor.

Witnesses: Austin Cate, Sheriff of Knox County, Esco Jenkins 2305 Johnson Street, W. H. Marshall, Southern Bell Tel Co., Fred Adcock 5503 Lakeshore Dr., 7-4485, R. G. Brittian 17 Lawson Ave., Calvin Copeland Route 1, Powell, John T. Reynolds (Look on inside) T.B.I. Ph. 129 Morristown (Call H'way Patrol), Witnesses: Estel Wrinkle, E. W. Young, Deputy Sheriffs, Theo Lyle, Pat Patterson, County Detectives; T. Mack Blackburn, R. D. Longmire, Dist. Attny's Office, Virgil Kitts, State Fire Mar-

shall, George Ireland, City Police, Britt B. Beal, McCubbins Rd. 3-6802, Lonnie E. Spangler, Service Cabbs, Chester Atchley Burlington Texaco Station, E. E. Dykes, City Police Dept. 311 Beachwood Dr. 7-4427, Joe Broome. Clerk: Summon above named witnesses for the State. Hal H. Clements, Jr. District Attorney General. Witnesses sworn by me in presence of the Grand Jury. May 17, 1955. Virgil Graves, Foreman of the Grand Jury. Filed 18 day of May, 1955, Tolbert F. Taylor, Clerk. A true bill. Virgil Graves, Foreman of the Grand Jury.

STATE OF TENNESSEE, COUNTY OF KNOX,
Criminal Court for Knox County, March Term, 1955:

The Grand Jurors for the State of Tennessee, upon their oaths, present That Gerald William Nelson alias Jack Nelson alias and John E. Hatton and Garnel Lee Craig heretofore, to-wit: On the day of May, 1955, in the State and County aforesaid, unlawfully, and feloniously did wilfully and maliciously damage and destroy the real property of Esco Jenkins, Ray Jenkins and Georgia Jenkins by the use of dynamite and other explosives, said real property [fol. 7] being known and designated as 2305 Johnson Street and located in the 19th Ward of the City of Knoxville, Knox County, Tennessee, contrary to the Statute and against the peace and dignity of the State.

Second County

And the Grand Jurors for the State of Tennessee, upon their oaths, do further present that: Garnel Lee Craig, heretofore, to-wit: On the day of May, 1955, in the State and County aforesaid, unlawfully, was an accessory before the fact in the commission of a felony; that is to say, that the said defendant did feloniously move, incite, counsel, hire, command and procure Gerald William Nelson alias and John E. Hatton to wilfully and maliciously damage and destroy the real property of Esco Jenkins, Ray Jenkins and Georgia Jenkins by the use of dynamite and other explosives, said real property being known and designated as 2305 Johnson Street and located in the 19th Ward of the City of Knoxville, Knox County, Tennessee, contrary to the Statute and against the peace and dignity of the State.

Third Count

And the Grand Jurors for the State of Tennessee, upo their oaths, do further present that: Gerald William Nel son alias Jack Nelson, alias and John E. Hatton and Gar nel Lee Craig, heretofore, to-wit: On the day of May 1955, in the State and County aforesaid, unlawfully, wil fully and maliciously did damage and destroy real prop erty of the Southern Bell Telephone Company, a Corpora tion, said property being a cross-connecting terminal and located on an alley off Johnson Street in Knox County Tennessee by the use of dynamite and other explosives contrary to the statute and against the peace and dignity o the State.

Fourth Count

And the Grand Jurors for the State of Tennessee, upo their oaths, present That Garnel Lee Craig heretofore, to wit: On the day of May, 1955, in the State and County aforesaid; unlawfully, was an accessory before the fact in the commission of a felony; that is to say, that the said [fol. 8] defendant did feloniously move, incite, counsel, hire, command and procure Gerald William Nelson alias Jack Nelson alias and John E. Hatton to wilfully and ma liciously damage and destroy the real property of the Southern Bell Telephone Company, a corporation, said property being a cross-connecting terminal and located of an alley off Johnson Street in Knox County, Tennessee, by the use of dynamite and other explosives, contrary to the Statute and against the peace and dignity of the State.

Fifth Count

And the Grand Jurors for the State of Tennessee, upon their oaths, do further present that: Gerald William Nel son, alias Jack Nelson alias and John E. Hatton and Gar nel Lee Craig, heretofore, to-wit: On the day of May, 1955, in the State and County aforesaid, unlawfully, wil fully, and maliciously did damage and destroy the personal property of the Southern Bell Telephone Company, a Cor poration, by the use of dynamite and other explosives, said personal property being a cross-connecting terminal of the value of $395.00, damaged and destroyed to the extent of $390.00 of the total value of said cross-connecting ter-

minal; said personal property being located on an alley off Johnson Street in Knox County, Tennessee, contrary to the Statute and against the peace and dignity of the State.

Sixth Count

And the Grand Jurors for the State of Tennessee, upon their oaths, do further present that: Garnel Lee Craig, heretofore, to-wit: On the day of May, 1955, in the State and County afore-said, unlawfully, was an accessory before the fact in the commission of a crime and a felony; that is to say, that the said defendant did feloniously move, incite, counsel, hire, command and procure Gerald William Nelson alias Jack Nelson alias and John E. Hatton to wilfully and maliciously damage and destroy personal property of the Southern Bell Telephone Company, a Corpora-
[fols. 9-12] tion, by the use of dynamite and other explosives, said personal property being a cross-connecting terminal of the value of $395.00, the further description to the Grand Jurors unknown, and being damaged and destroyed to the extent of $390.00 of the value of said cross connecting terminal, said personal property being located on an alley off Johnson Street in Knox County, Tenn., contrary to the Statutes and against the peace and dignity of the State.

Ital H. Clements, Jr. (S), Attorney General.

Court adjourned until tomorrow morning at 9 o'clock.

(Signed) J. Fred Bibb, Judge.

[fol. 13] In the Criminal Court of Knox County

Minute Entry of July 14, 1955 re Impaneling of Jury

[Title omitted]

There having been insufficient jurors reporting out of the previous drawings, and an order having been made upon the Jury Commissioner to draw two hundred additional names from the jury box for jury service, out of those reporting the following qualified citizens were se-

lected as jurors for jury service: O. H. Dunnaway, J. W. Henderson and W. A. Asberry. It appearing that there are still not enough jurors selected to fill the panel for this trial, it is ordered that the Jury Commissioner draw from the Jury Box an additional one hundred and twenty names to be summoned, to appear at 9:00 O'Clock tomorrow morning for jury service. The jury is respited in charge of John Lkein, Deputy Sheriff, heretofore sworn, until tomorrow morning at 9 O'Clock.

Court adjourned until tomorrow morning at 9 O'Clock.

(Signed) J. Fred Bibb, Judge.

[fol. 14] IN THE CRIMINAL COURT OF KNOX COUNTY

MINUTE ENTRY OF JULY 15, 1955, RE IMPANELING OF JURY

Court met pursuant to adjournment, present and presiding the Honorable J. Fred Bibb, Judge of the Criminal Court for Knox County, when the following proceedings were had and entered of record, to-wit:

Nos. 2205 & 2206, Felony

THE STATE

vs.

GERALD WILLIAM NELSON, GARNELL LEE CRAIG & JOHN E. HATTON

There having been insufficient jurors reporting out of the previous drawings, and an order having been made upon the Jury Commissioner to draw an additional one hundred twenty names from the jury box for jury service, out of those reporting the following qualified citizen was selected for jury service: T. L. Mize, Jr. It appearing that there are still not enough jurors selected to fill the panel for this trial, it is ordered that the Jury Commissioner draw from the Jury Box an additional one hundred and twenty names to be summoned to appear tomorrow morning at 9:00 O'Clock for jury service. The jury is

respited in charge of John Lkein, Deputy Sheriff, heretofore sworn, until tomorrow morning at 9:00 O'Clock.

Court adjourned until tomorrow morning at 9 O'Clock.

(Signed) J. Fred Bibb, Judge.

[fols. 15-22] IN THE CRIMINAL COURT OF KNOX COUNTY

MINUTE ENTRY OF JULY 16, 1955, RE IMPANELING OF JURY

Court met pursuant to adjournment, present and presiding the Honorable J. Fred Bibb, Judge of the Criminal Court for Knox County, when the following proceedings were had and entered of record, to-wit:

Nos. 2205 & 2206, Felony

THE STATE

vs.

GERALD WILLIAM NELSON, ALIAS JOHN E. HATON & GARNELL LEE CRAIG

There having been insufficient jurors reporting out of the previous drawings, and an order having been made upon the Jury Commissioner to draw an additional one hundred twenty names from the jury box for jury service, out of those reporting the following qualified citizen was selected for jury service: D. W. Kitts. The jury is respited until Monday morning at 9:00 A. M., in charge of John Klein, Deputy Sheriff.

Court adjourned until Monday morning at 9:00 O'Clock.

(Signed) J. Fred Bibb, Judge.

[fol. 23] In the Criminal Court of Knox County

No. 2206, Felony

The State

vs.

Gerald William Nelson, John E. Hatton & Garnell Lee Craig

Verdict—July 26, 1955

Came the Attorney General for the State, also defendants in proper person, having counsel present, and also jury sworn to resume consideration of this cause. Having heard the proof in this cause, argument of counsel and charge of the Court, upon their oaths the jurors say:

As to Defendants Hatton and Nelson:

That they find each defendant guilty of the 1st and 5th Counts of the indictment as charged and fix the punishment of each defendant at confinement in the State Penitentiary for a period of three years. Thereupon counsel for the defendants entered a Motion for a New Trial and are given twenty days within which time to file said Motion.

As to Garnell Lee Craig:

Upon their oaths the jurors say: they find the defendant Not Guilty.

Court adjourned until tomorrow morning at 9 o'clock.

(Signed) J. Fred Bibb, Judge.

[fol. 24] IN THE CRIMINAL COURT OF KNOX COUNTY

No. 2206, Felony

THE STATE

vs.

GERALD WILLIAM NELSON, JOHN E. HATTON & GARNELL LEE CRAIG

VERDICT—July 26, 1955

Came the Attorney General for the State, also defendants in proper person, having counsel present, and also jury sworn to resume consideration of this cause. Having heard the proof in this cause, argument of counsel and charge of the Court, upon their oaths the jurors say: As to Defendants Hatton & Nelson: That they find each defendant guilty of the 1st and 5th Counts of the indictment as charged and fix the punishment of each defendant at confinement in the State Penitentiary for a period of three years. Thereupon counsel for the defendants entered a Motion for a New Trial and are given twenty days within which time to file said Motion.

As to Garnell Lee Craig:

Upon their oaths the jurors say: they find the defendant Not Guilty.

Court adjourned until tomorrow morning at 9 o'clock.

(Signed) J. Fred Bibb, Judge.

[fol. 25] IN THE CRIMINAL COURT OF KNOX COUNTY

[Title omitted]

MOTION FOR A NEW TRIAL—Filed August 2, 1955

Come the defendants; Gerald William Nelson and John Hatton, and move this Honorable Court to set aside the verdict of the jury finding them guilty on the first and fifth counts of the indictments against them and fixing their

punishment at the maximum of three years imprisonment for the following reasons and upon the following grounds, to-wit:

I

The Honorable Trial Court erred in discharging for cause the following named jurors, upon the grounds that they were members of a Union Organization:

J. L. Webb; R. E. Easterly; L. C. Needham; T. C. Foster; G. W. McMillan; H. E. Grubb; J. P. Hughes; J. F. Smith; F. W. Morgan; T. R. Harrington, Jr.; L. R. Ruth; L. H Tolson; Mr. Sharpe; R. F. Luck; Mr. Brooks; Verlin Jenkins; C. H. Crisp; W. T. McCloud; L. R. West; R. C. Ailor; T. P. Dowling and M. F. Lewis.

A

Because the removal and discharge for cause from the Jury Panel violates the letter and spirit of Article 1, Section 6 of the Constitution, providing that the right of trial by jury shall remain inviolate and no religious or political test shall ever be required as a qualification for jurors.

[fol. 26]

B

The right of challenge for cause is designed to exclude from the jury, triers whose bias and prejudice render them unfit and there is no intimation that the mere fact that a person does or does not belong to a labor union would give rise to this right.

C

Because the only means provided and limited to each side is that of peremptory challenge which is intended and does permit the exclusion of those suspected of bias or prejudice. These rights of challenge were assured at common law as procedural instruments for the purpose of maintaining the traditional rights of a fair and impartial jury. There is no doctrine of exclusion other than that set out in the Constitution and statute.

The exclusion of all members of organized labor from the jury was an unreasonable exercise of discretion by the Honorable Trial Judge, notwithstanding that a number of the persons challenged for cause by the State's Attorney

General because they belonged to some labor organization, there persons whose names were regularly drawn from the jury box and had been regularly passed to the State by the Trial Court as a fair juror, when such persons were required to disclose their membership in a labor organization or union by the Attorney General, the Court sustained the State's request to challenge for cause because the prospective jurors stated they would and could fairly consider the case, upon the law and the evidence. There was no disqualifying information other than membership in a labor organization, and it is not per se a ground for challenge for cause.

II

The Honorable Trial Court was in error in not requiring the State to make an election as to the count or counts that defendants would be put to trial on, when said motion was reasonably made by the defendants.

[fol. 27]

A

The Honorable Trial Court erred in failing to sustain defendants' motion to quash the indictment, when seasonably made.

III

The Honorable Trial Court erred in admitting the statements of the defendants, Nelson, Hatton and Craig, when seasonable objected to, because said statements were largely irrelevant and immaterial and were the conclusions of the District Attorney General, obtained by means of cross-examination, oppression, mental cruelty and duress, and obtained in violation of the Bill of Rights and of the due process clause of the Fourteenth and Fifth Amendments, and because said statements were required before defendants were permitted to confer with counsel and because the defendants were required to change their statements against their wills, as is by the record shown.

Because the physical facts and uncontradicted evidence of the state's witnesses, including the Attorney General, and the sisters of the defendant, Nelson, and others present, that these defendants were not in possession of Mental Freedom to confess or deny the accusation in the presence of the officers, including the Attorney General, at the time

of their questioning, while in custody of the police officers and after being refused to consult with their counsel, thus doing violence to the due process clause of the Constitution.

IV

The Honorable Trial Court was in error in refusing to permit the introduction of the testimony of the witnesses as to the way and manner of procuring the said confessions or statements in their evidence before the jury. When said evidence was offered, it showed that the statements were not freely, voluntarily, and understandingly made, and said evidence certainly would have weight as to the believability [fol. 28] of said confessions by the jury, and the Honorable Trial Court so instructed the Jury, though the testimony was excluded from them upon the ground it only affected the admission of said statements and did not concern the Jury, the rule in Tennessee being that the weight of a confession is for the Jury's determination and its admissibility is a preliminary question to be determined by the Trial Court.

V

The Honorable Trial Court was in error in the admission of the testimony of acts of violence during the strike, other than those for which the defendants were put to trial, and although this evidence was withdrawn from the jury, there was proof that one of the defendants had previously worked in Roane County where No. 33 is the car license prefix and the evidence showed that one of the defendant's automobile had Roane County licenses on it.

A

Because the defendants requested counsel and were refused the right to see counsel or to have counsel present at the questioning, the State's Attorney well-knowing that attorneys were making an effort to contact the defendants, and he issued specific orders denying counsel the right to see the defendants. Therefore, there did not exist that fundamental fairness essential to the very concept of justice and the said evidence was in no sense a free and voluntary confession. The voluntary or involuntary character of an admission or confession is to be determined as a conclusion

whether the accused at the time he confesses is in possession of Mental Freedom to confess or deny a suspected participation in a crime.

VI

The Honorable Trial Court erred in admitting in evidence and allowing to be failed a gallon of sulphuric acid, permitting certain demonstrations which were very prej- [fol. 29] udicial, with testimony as to its effect on the person, clothing, cars, etc., when same was immaterial, irrelevant and in no wise connected with any issue involved in the law suit.

VII

Because there was no competent, credible and believable testimony upon which to predicate the verdict of guilty.

VIII

The competent and legal evidence does not support the verdict and finding of the jury, but preponderates against it and in favor of the innocence of the defendants.

IX

Because the admission of incompetent, prejudicial statements before the Jury affected the verdict against them.

Wherefore defendants pray that the verdict of the Jury be set aside and that they be granted a new trial herein.

Gerald William Nelson, John Hatton, By R. C. Smith (S), Rex McGhee (S), Hobart F. Atkins (S), Counsel for the Defendants.

[fol. 30] IN THE CRIMINAL COURT OF KNOX COUNTY

Nos. 2205 and 2206

STATE OF TENNESSEE

vs.

GARNELL LEE CRAIG, JOHN E. HATTON and GERALD WILLIAM (JACK) NELSON

July 11-26, 1955.

Bill of Exceptions

APPEARANCES:

Hal H. Clements, Mack Blackburn, Attorneys for ~~State~~.

~~Hobart Atkins~~, R. C. Smith, Rex McGee, Attorneys for Defendants.

COLLOQUY BETWEEN COURT AND COUNSEL RE SELECTION OF JURORS AND OBJECTIONS THERETO

This case came on to be heard on this the 11th day of July, 1955, before the Honorable J. Fred Bibb, Judge, and a Jury, in the Criminal Court of Knox County, at Knoxville Tennessee, when the following were all the proceedings:

The Court ruled that each defendant would be entitled to eight peremptory challenges in each case for a total of forty-eight, and the State would be entitled to four peremptory challenges per defendant in each case for a total of twenty-four.

During the selection of twelve jurors, the defendants exercised the peremptory challenge to each of the following: Mr. Harvey, George Vinyard, O. H. Graves, Mr. Voorhees, O. M. Summers, G. L. Harrison, H. M. Smith, W. H. Cruze, K. W. Phillips, T. H. Brandon, T. E. Hatcher, J. E. Buckner, Mr. Bounds, J. K. Wolfe, H. C. Love, J. C. Bussell, S. J. Wilson, J. C. Pugh, J. D. Clapp, R. L. Gray, W. A. English, J. P. Keener, T. C. Allen, A. C. Wagner, Mr. Ford, J. B. Reed, E. L. Hodge, Harry Lemnase, J. W. [fol. 31] Duval, C. W. Smith, F. A. Ball, P. B. Bateman,

R. F. Barringer, G. M. Gamble, P. D. Harrington, L. A. Webb, J. H. Scott, Mr. Letsinger, T. C. Sanders, A. G. Bagley, A. E. Karns, J. F. Turner, J. E. Ackridge, S. E. Johnson. A total of forty-four challenges. The first sixteen of the above *challenges* were exercised by defendant Hatton; the second sixteen of the above challenges were exercised by defendant Nelson, and the remaining exercised by defendant Craig, it being agreed at the beginning of the trial they would be charged in this order but each defendant having the right to challenge at long against the 48 examined.

During the selection of the twelve jurors, the State exercised a peremptory challenge to each of the following: E. J. Arnold, C. L. Bowers, E. W. Leslie, J. W. Aft, Ernest L. Engle, G. H. Hall, G. L. Hoakum, A. V. Acuff, H. L. Bettes, W. H. Adams, W. T. Chase, W. O. Myantt, and Frank Haynes, a total of thirteen.

After the selection of the twelve jurors, further challenges were exercised by both state and defendants in the selection of the thirteenth juror.

During the selection of the Jurors, the following statements, objections and rulings were made.

Mr. M. L. Bloomer stated he had formed an opinion from reading the papers, but no opinion as to whether or not the defendants are guilty or innocent. Is a member of carpenter's union and has been for 21 years. Doesn't necessarily have prejudice for unions because he works on a job for the government, but would be different if it wasn't a government job. Is afraid he would have some feeling [fol. 32] toward a person eligible to belong to a union, but didn't; affiliating is such he thinks he would have to judge differently a person charged with violence arising from labor and violence arising from other causes. Excused by the court. Defendants excepted.

The Court: Gentlemen of the jury (four having been selected at this period) in these questions that are being asked, attorneys on each side have the right to ask questions to determine whether they want to exercise a peremptory challenge or whether or not they want to object to the juror, not necessarily wilfully to disqualify him but to find out his beliefs on certain ideas. But whatever any witness answers to a question you are not to consider it. You are not trying the case on any answer of anybody for jury

service, you are to try it on the law and the evidence introduced from the witnesses later on. Under the law you are required to be here present. You have ears and eyes, and I can't keep it away from you, but pay no attention to it. To make myself clear I will say this further with reference to challenges for cause or otherwise. It is my opinion that if a person, a member of a union which in event of a strike would require them, that is presently a member of a union, not formerly but presently, which would require them to go out on a similar strike I think they are disqualified, and if you ask a challenge on that reason the challenge will be sustained.

Mr. Atkins: Let the record show we except to the statement of the court, and except to the examination by the State's attorney.

The Court: Exception is noted and gentlemen of the jury I will reaffirm, give no consideration to questions or answers asked the different prospective jurors.

[fol. 33] Mr. Atkins: I know the Court understands we would like for the record to show that we except on two grounds, one, that it is improper, and two, because Court's charge to the jury can only be delivered to the whole jury, and then it must be a written charge, and on that basis, merely to keep the record straight.

The Court: It is straight. Overrule the objection and exception noted.

Mr. R. E. Easterly knows John Hatton distantly just thru church relations, knows some of his people, and could be embarrassing to sit in a case where he was defendant, and couldn't be as impartial as if it were a stranger. Excused by the court.

L. C. Needham is a member of a Southern Railway union, and was when they were on a strike, has no prejudice against a person who does or does not belong to a union; would have a different opinion about a crime arising from a strike and from some other causes. Excused by the court.

Mr. Atkins: The same exception for the record.

The Court: All right.

E. L. Weaver, has been member of a union, branch of A.F.L., for 10 or 12 years, wouldn't be allowed to cross picket line in a strike. Excused by the court.

Mr. Atkins: Without keeping up our exceptions may we treat them as being made each time?

The Court: Yes. Exception noted.

R. E. Tally, stated he has not formed opinion as to guilt or innocence of these men, wouldn't say he had prejudice against a labor union or feeling for or against a person who did or didn't belong, has definite opinions and convic-
[fol. 34] tions and sanctity of property rights. Whether a crime arose out of a labor dispute instead of a personal matter might shade his thinking a little bit as to whether he felt certain pressure was brought on that man to do something.

Gen. Clements: In other words, you would have to regard then the trial of a person charged with a crime that arose out of a labor dispute differently than you would the trial of a person charged with a crime that didn't arise out of a labor dispute?

Mr. Talley: Possibly I would.

Excused by the court.

Mr. Atkins: So that if that question arises again defendants take the position that those matters are matters of proof and not proper matters of inquiry on the voir dire. Whether a juror would or would not convict is rather a delicate question. I just want to state for the record our position that the inquiry on the voir dire is not permitted to enter into what proof may or may not be.

The Court: I can't get your position, Mr. Atkins. I understand what you are talking about, but it is not this matter involved here. It is the duty of the court as well as the Attorney General and also the defendants and counsel of defendants to see that a fair and impartial jury is submitted for this trial. Now when a citizen comes in and says that he has such feeling, that he feels prejudicial toward anybody in a labor union that would commit violence then he is not in my opinion a qualified juror.

Mr. Atkins: I agree with you.

The Court: Therefore I honor the State's excuse for cause. It seems the ruling is more beneficial to defendant [fol. 35] than hurtful, but whether beneficial or hurtful it is the duty of this court to give everybody a fair trial. That is all I am trying to do. Your exception is noted.

Mr. Atkins: May I clarify it?

The Court: I would like for you to some other time, but not now, we haven't time.

Mr. Atkins: I want to say this. I think your Honor is as well qualified in criminal law as any of our justices, and that is honest. But here is my position exactly, without generalizing it. Mr. Talley said it would depend on the demand put on him. In other words, he indicated that he would determine all the facts and circumstances as to why the thing was done, and that we think was not a violation, and we think you certainly can't explore the mind of a juror, you can only ask him generally. I thot that would be a dangerous thing if every juror was to be subjected to an examination on propositions that have not come up. But your Honor's ruling is the law, and I only state that to clarify what is in my mind. I thot this man was excused for cause?

The Court: It was for cause. He was excused for cause, and the reason was not what you base it upon. The only reason I sustained challenge for cause was because he said in his opinion he would lean more towards unfairness, that is another way to put it, I don't want to be unfair to a witness, that he would not be fair in a trail of a union case where some fellow on strike committed violence. That is boiled down to what he said. We have to have jurors that can be fair.

T. G. Foster stated he read the newspapers, but doesn't know who did it; is a member of Electrical Workers union, does not cross picket lines of other unions.

Excused by the court.

[fol. 36] Mr. Atkins: Let the record show we enter an exception.

The Court: Note the exception.

G. W. McMillan, states he read the paper, heard the blast that morning but didn't know what it was, or whether these defendants are guilty or innocent; member of union at Portland Cement Co., since about 1941. Doesn't know that he has anything against anybody belong or not belonging to a union, but belongs to one and thinks it is a good thing; has no prejudice against one not belonging, feels it would keep down a lot of confusion if everybody belonged to the organization, doesn't think he would have any feeling against anybody because that is not the right attitude, that it is every man's business to join or not.

Gen. Clements: What I am trying to ask is this, is there any reason or feeling that you have whereby you would

regard or try as a juror a person charged with violence that grew out of a labor dispute or strike, differently than you would try the case of a person charged with a crime of violence that arose out of some other cause, maybe some personal matter?

Mr. McMillan: No, I don-t think so. We are all human beings. I don-t think I would make a difference on either side.

Gen. Clements: You couldn't cross the picket line of another union under your rules, could, you?

Mr. McMillan: No.

Excused by the court.

Mr. Atkins: Save exception,

H. E. Grubb, member of union now at Fulton's Federation of labor, would be required not to cross picket line and wouldn't cross one, that if he has to work he has to join it. [fol. 37] The Court: Challenged for cause by reason of the fact he is an active member of the union.

Mr. Atkins: We except.

Mr. J. P. Hughes states he is a member of a C.I.O. union but rules do not require him not to cross picket lines and he has crossed them, doesn't understand what he means by jurisdictional dispute.

Mr. Atkins: Of course we keep up our exceptions.

The Court: I think it is a competent question to be asked to determine whether or not he wants to exercise a challenge. If he is an active member of an affiliated union as I understand, then he has interest in the case and not a qualified juror. That is what I have been holding and still hold it.

Gen. Clements: I want to see whether I want to exercise a challenge for cause. There have been times you were out over there yourself?

Mr. Hughes: Yes sir, we were out.

The Court: Sustain the challenge for cause and exception noted.

Mr. Atkins: We will say this, if that rule applied to us every person who had a telephone would be to some extent interested.

The Court: No, no. That is different. I have a telephone but I'm not a member of a union. I would say this, anybody that own- stock in the telephone company would

not be competent as a juror. If they are not a member of a union they are not interested. A person has a right to join a union if *the* please or not.

Mr. McGhee: But if you say because they join the union they can't sit in judgment——

[fol. 38] The Court: I never said that because they belong to the union they are not qualified to sit in judgment; I say if they are members in this case because of their interest.

Mr. Smith: Is that a member of any union?

The Court: Yes sir, any union, hod carriers or whatever.

J. F. Smith, belongs to the union and committee member, recently gave it up.

Challenged for cause and excused by the court.

Mr. Atkins: Let the exception continue.

F. W. Morgan, works for Fulton, belongs to general union, rules require him not to cross other picket lines.

Excused by the court upon State motion for cause.

Defendants excepted.

T. R. Harrington, Jr., from 1942 until now belongs to Brotherhood of Railroad Firemen & Engineers, states he is on the Board but on leave from railroad, still belongs to union, never was engaged in any labor dispute, last actively engaged in railroad business in 1946, now actively engaged in insurance business, feels very strongly a person has a right to join or not to join a union. Knows the father of one of the boys but would attempt not to let that affect him; knows Mr. Hatton on the Fire Department personally and has had dealings with him, doesn't know whether that would embarrass him or not as he never was in that situation before, but doesn't think one could keep a thing like that from entering their mind, is afraid he couldn't try his son as a stranger, and would hate to be put in such position. Would like to think it would not affect his judgment but doesn't know whether it would or not.

[fol. 39] The Court: There are things you don-t like to do and don-t want to do. Do you feel your association with him was such it would probably influence your judgment in the case?

Mr. Harrington: I think if there would be any benefit or doubt there possibly it would affect my opinion, the fact I know his father and I think a great deal of him.

Excused by the court:

L. R. Ruth, member of I. B. W. Union at Oak Ridge three years; states if his union called a strike he would not cross picket line, but if his union didn't call it he would cross it.

Challenged for cause, excused by the court.

Mr. Atkins: We except.

L. H. Tolson, member of teamsters union about 10 years, and as such member couldn't cross picket line.

Challenged for cause, excused by the court.

Mr. Atkins: We except.

W. F. Sharp, member of union, would not cross picket line of own union, but has others.

The Court: Would you say, Mr. Sharp, that you are now an active member belonging to an affiliated union either C. I. O. or A. F. L.?

Mr. Sharp: Yes.

Challenged for cause and excused by the court.

Mr. Atkins: We except.

R. F. Lucke, member of glass workers union, now in private employment; would refuse to cross picket line of strike called by another union.

Challenged for cause, excused by the court.

Mr. Atkins: We except.

[fol. 40] M. O. Brooks, belongs to railroad union and still has affiliation, and in emergency could be called back to work, is on retired status, doesn't have to pay dues, they are paid for life when retired.

The Court: You are still in good standing and affiliated?

Mr. Brooks: Yes, for life.

Challenged for cause, excused by the court.

Mr. Atkins: We except, and we would like for the court to show it is the Brotherhood of Locomotives, Railway Express Messengers.

Verlin Jenkins belongs to union of Western Union, has been 12 years, formerly secretary.

Gen. Clements: As such you couldn't have delivered a telegram into the telephone office when the union was out, could you?

Mr. Jenkins: Well, I wouldn't do it anyway. Of course if we had to transact business by telephone of course it was done anyway. We had certain duties that had to be performed. States it is up to the individual if he wants to

cross a picket line, there is no rule in the union against it, but that he never had, that he is now an active member of his union.

Challenged for cause, excused by the court.

Mr. Atkins: We except.

C. H. Crisp stated he would have feeling for a person who belongs to a union, that he has no use for the unions and has such prejudice he couldn't try a union member fairly.

Excused by the court.

W. T. McCloud states he is in good standing as member of steel workers union, generally classed as building trades union, that crossing a picket line would depend on whether it was legal, that if it was an authorized strike by all the [fol. 41] unions or something like that, he couldn't cross the line.

Challenged for cause, excused by the court.

Mr. Atkins: We except.

The Court: Now then we will continue until we have selected the thirteenth or alternate juror. As I understand the statute, after the jury is sworn we then begin the selection of the alternate. So read your indictment, gentlemen.

Thereupon the Attorney General read the indictment to the jury.

Mr. Atkins: At this time we want to ask the court to require an election.

The Court: I dont think so at this time. In certain instances at the close of the State's proof they are required to elect, but I am, after reading this indictment, of course I haven't heard the proof yet, I will reserve judgment on the matter. But after reading this indictment I doubt that the State is required to elect at all. Overruled at this time.

Mr. Atkins: I wanted to have that matter before the court.

The Court: The motion is overruled at this time and exception noted. Judgment will be reserved on it however.

Mr. Atkins: Then, your Honor, to keep the record straight, we then move to quash on the ground that there couldn't be two charges, one for p-incipal as a felon, and the other for accomplice to the commission of the felony, that they would be matters that would not be charged on one act. So that there may be every matter presented, we

would like now to further consider the motion on the basis that there are two offenses, one to real and the other to [fol. 42] personal property, and that before pleading we should know as to which of those offenses we are to be put on trial.

The Court: In answer to the first motion, I think in the first place it is a matter that cannot arise until the close of the State's proof, and I am of the opinion now that the State does not have to elect. It can go to the jury for the jury to determine whether it is real or personal property. It is similar, in the same class, a little different punishment on one than the other, and I understand it is permissible for one indictment to so join such crime.

Mr. Atkins: We have to go to the other states for authority, and that is one reason I made the motion. We except of course, and our plea to each and every count, and for each and every defendant, is not guilty.

The Court: A plea of not guilty is entered for the defense, gentlemen. Now be sworn.

Thereupon the jury was sworn.

The Court: Gentlemen of the jury, I will charge you further about this later, but always keep in mind that we are trying by consent, to save having to go over the same testimony, these two cases. They are separate and distinct. You should keep them separate and distinct in your mind, there is one about a school and another about a house in some other part of town, and render separate judgments. Bear that in mind at all times. Now we will proceed to select the alternate juror. Each side has two peremptory challenges, and I would like for the record to show that the defendants still had at least three according to the court's count, on peremptory challenges, left.

L. R. West, knows of Hatton, used to belong to a union, doesn't have occasion to belong now, hard to say whether [fol. 43] he would have feeling against a person who did not belong to the union if the shop was organized. States a lot of people make statements about a union they don't realize what they are making and don't know what the union stands for.

Gen. Clements: Would it take more proof to prove a person guilty in a crime where a labor dispute is involved rather than a personal matter?

Mr. West: Yes sir.

Gen. Clements: It would?

Mr. West: Yes sir.

Challenged for cause, excused by the court.

Mr. Atkins: We except.

R. G. Nibb, belongs to glass workers union affiliated with C. I. O., never held a position in it.

Challenged for cause.

The Court: In as much as he is an active member with an affiliated union, I have heretofore held, and I haven't changed my mind, the challenge is sustained. Exception is noted.

T. P. Dowling, recordier, secretary of plumbers union, a craft union.

Challenged for cause, excused by the court.

Mr. Atkins: Note an exception.

E. G. Bishop, thinks he would be biased, belongs to office employee union and father and most of family are union members, feels a person charged with crime of violence growing out of labor dispute would need more proof to convict than otherwise.

Challenged for cause, excused by the court.

Mr. Atkins: We except.

[fol. 44] The Court: (after some discussion) The reason I am making this statement this morning, I had indicated to you that you had exhausted your challenges; and I wanted to give you notice that I was in error, that you are entitled to another two because there are two cases being tried together. If there were only one case you would have only two, but since there are two cases tried together, I think you have two more. I imagine that question will not arise, but I wanted to make myself clear.

M. F. Lewis, a pipe fitter and member of Local 309, and an active member now.

Challenged for cause, excused by the court.

Mr. Atkins: We except. To keep the record straight let us except to the allowance of four to the State. If a union man is not qualified would a member of management be qualified?

The Court: You have asked me a question, I will try to answer it. There is absolutely and as I see it cannot be any comparison in the two for this reason. And don't mis-

understand me. I all about the unions. My father was one of the two men that met two years before I was born and helped form the Central Labor Union here in the City of Knoxville. He was a member of the Brotherhood of Railroad Locomotive Engineers. I have always been in favor of union men. There is no arbitrary ruling about the matter. Nobody works any harder than I do, talking about a working man. A man belongs to the union, he has a perfect right to belong. When a strike is called the union goes out. We see in the papers every day where this man goes out, this organization goes out, that organization goes out, because of a strike being called, *not* by his union but by some other union. And consequently I say [fol. 45] that a man that is an active member of a union is interested in the outcome of this case, because the union is involved. Now that is my reason. I may be wrong, but that is the way I see it, and in other words, a citizen who is an active member of a union—this man here while ago that formerly belonged to the union and wasn't active and wasn't participating, then I held he was a competent juror. He is not controlled by the action of the union. He didn't have to go out. He didn't have to cross a picket line, or refuse to cross a picket line.

I feel that is about it. I think the difference, as you seem as far as the union is concerned. The management is an entirely separate proposition. The owners never come out. They are not organized. Because there is a strike we will say at a coal mine, the people that run the zinc company don't say, "Now you folks get out." It is altogether different. I just can't see that there could be any similarity. Draw out 50 names and let's go.

Mr. Atkins: We except to the court excluding men and also holding that the union men are excluded that management—your Honor——

The Court: It is in the record.

Mr. Atkins? The court understands our position?

The Court: I understand, no need talking about it. Draw the names. It may be until the first of September when we get this jury, but we are going to get them if there is nobody left here but me.

The court stated after talking with Gen. Tipton at Nashville, he would hold that each defendant had two challenges

each in each case, or a total of 12 in all, and have exhausted four, leaving them eight challenges. And that the state [fols. 46-47] also in this proceedings and twelve challenges; have exhausted three, leaving nine for the state

Thereupon the thirteenth juror was selected.

The Court: Now then, Mr. Wyatt, you are the 13th or alternate juror. You are just as much a part of this jury as the first man chosen. As a matter of fact you have more chances to serve than they have. They have just one chance, but you are here to take the place of anyone of the twelve that may fall by the wayside. We hope they are not going to, but you never can tell, and you have 12 chances to serve rather than one. Now it is necessary you are with them all the time, one of them, stay with them until the case is finally submitted to the jury, and if all the 12 are up and able to answer the bell you will be discharged. Otherwise you take the place of anyone not able to complete the trial. Now it is necessary to state to him what the case is about, Gen. Clements.

Thereupon Gen. Clements made a statement of the charges in the indictment.

A plea of not guilty was entered for all three defendants to all charges.

The thirteenth juror was sworn. Witnesses were sworn and excused under the rule. A deputy sheriff was sworn to take charge of the jury.

Mr. Atkins: The record will show an exception to the last motion and the same ruling as we did when the twelve were sworn if necessary.

The Court: All right. This motion, in other words, you want to renew that motion after the swearing of the thirteenth juror?

Mr. Atkins: Yes.

The Court: I don't think it is necessary, but it can be shown it is renewed and overruled and excepted to.

[fol. 472] In Supreme Court of Tennessee

Assignments of Error, Brief and Argument

I

The Honorable Trial Court erred in discharging for cause the following named jurors, upon the grounds that they were members of a Union Organization:

E. L. Weaver, T. G. Foster, G. W. McMillan, H. E. Grubb, J. P. Hughs, J. F. Smith, F. W. Morgan, L. R. Ruth, L. H. Tolson, W. F. Sharp, R. F. Lucks, M. O. Brooks, Veglin Jenkins, W. T. McCloud.

A

Because the removal and discharge for cause from the Jury Panel violates the letter and spirit of Article 1, Section 6 of the Constitution; providing that the right of trial by jury shall remain inviolate and no religious or political test shall ever be required as a qualification for jurors.

B

The right of challenge for cause is designed to exclude from the jury, triers whose bias and prejudice render them unfit and there is no intimation that the mere fact that a person does or does not belong to a labor union would give rise to this right.

C

Because the only means provided and limited to each side is that of peremptory challenge which is intended and does permit the exclusion of those suspected of bias or [fol. 473] prejudice. These rights of challenge were assured at common law, as procedural instruments for the purpose of maintaining the traditional rights of a fair and impartial jury. There is no doctrine of exclusion other than that set out in the Constitution and statute.

The exclusion of all members of organized labor from the jury was on unreasonable exercise or discretion by the Honorable Trial Judge. These prospective jurors, whose names were regularly drawn from the jury box, stated to the Court that they would and could fairly consider the case upon the law and the evidence, and were regularly

passed to the State by the Trial Court as a fair juror. But when such persons were required to disclose their membership in a labor organization or union by the attorney general, the Trial Court sustained the State's challenge for cause upon grounds the prospective jurors were members of a labor union. There was no disqualifying information other than membership in a labor organization, and such membership is not per se a ground for challenge for cause.

Argument

It is respectfully submitted that the question presented to the Court by this Assignment of Error is:

Does mere membership in a labor union, where no bias or prejudice is shown, constitute sufficient grounds to sustain a challenge for cause by the State against prospective jurors in the trial of an individual for a crime growing out of a labor dispute?

In the trial below, the learned trial Court sustained a challenge for cause by the State against each of the following 14 prospective jurors upon the ground that they were or had been members of a labor union: E. L. Weaver, (Tr., Page 3); T. G. Foster (Tr., Page 5), G. W. McMillan (Tr., Page 6), H. E. Grubb (Tr., Pages 6-7), J. P. Hughs (Tr., [fol. 474] Page 7), J. F. Smith (Tr., Page 8), F. W. Morgan (Tr., Page 8), L. R. Ruth (Tr., page ( ), L. H. Tolson (Tr., Page 9), W. F. Sharp (Tr., Page 9), R. F. Lucke (Tr., Page 9), M. O. Brooks (Tr., Page 10), Verlin Jenkins (Tr., Page 10), W. T. McCloud (Tr., Page 10).

It is submitted that the action of the Trial Court was error because membership in a Labor Union is not sufficient reason to sustain a challenge for cause, and that in effect such a ruling amounted to granting the State 14 additional peremptory challenges and thus exceeding the number of such peremptory challenges as permitted by Statute. The action of the Trial Court was excepted to and made a part of the Motion for a New Trial.

More membership in a particular order or organization is not ground for challenges for cause, and does not render a member incompetent as a juror, at least where it is not shown that such order or organization is unlawful in its objects or purpose, or that it is in some manner interested

in, or connected with, the prosecution of the case at bar. (Emphasis Supplied).

See 50 C.J.S. Section 229 Page 976.

Membership in a Labor Union is not sufficient ground to challenge for cause where the individuals state on voir dire that they could and would try the case fairly and impartially, especially if it is not shown that their oath as members of said organization or the Charter and by-laws of such organization would interfere with their duties as jurors.

See Alabama Fuel & Iron Co. v. Powaski, 232 Ala. 66; 166 So. 782.

When the action of the Trial Court in sustaining a challenge for cause, or excusing a juror, *amounts to allowing the State extra peremptory challenges, then such action is prejudicial to the rights of the accused.* (Emphasis Supplied)

See 190 Tenn. 644 at page 648.

It is submitted that no union was a defendant in this case. No employer was prosecuting. To the contrary, the defendants were charged with destroying the property of Knox County, and of a private citizen.

[fol. 475] Of course, the record reveals that the alleged crimes occurred at a time when a labor dispute existed between the Southern Bell Telephone Company and its employees, but none of the prospective jurors who were challenged were present or former employees of the Southern Bell Telephone Company, nor were they connected with the phone company, nor were they a member of the union to which the Southern Bell Employees belonged.

None of the prospective jurors acclaimed any bias, or prejudice, and indeed, the only one questioned about being biased was G. W. McMillan, and he stated he could be an impartial juror.

Tr., Page 6.

There was no proof that unions to which the prospective jurors belonged had enacted any by-laws, rules, or regulations which would disqualify them from being good and lawful jurors.

It is clear from the record that the only reason the Honorable Court below sustained the State's Challenges was because the prospective jurors belonged to a labor union. On Page 2 of the transcript the Court stated:

> "It is my opinion that if a person, a member of a union which in event of a strike would require them, that is presently a member of a union, not formerly but presently, which would require them to go out on a similar strike, I think are disqualified, and if you ask for a challenge on that reason the challenge will be sustained."

On page 7 of the transcript, the Court stated:

> [fol. 476] *"If he is an active member of a affiliated union as I understand, then he has an interest in the case and is not a qualified juror. That is what I have been holding and still hold it."* (Emphasis Supplied)

On Page 8 of the Record, defense counsel inquired as follows:

> "Mr. Smith: *Is that a member of any union?*
> "The Court: *Yes sir, any union, hod carriers or whatever.*" (Emphasis Supplied)

The reasoning of the Trial Court in making such a ruling seems to be well shown in the following proceedings found on page 14 of the record.

> "Mr. Atkins: We except. To keep the record straight let us except to the allowance of four to the State. In a union man is not qualified would a member of management be qualified?
>
> "The Court: You have asked me a question, I will try to answer it. There is absolutely and I see it canont be any comparison in the two for this reason. And don't misunderstand me. I know all about the unions. My father was one of the two men that met two years before I was born and helped form the Central Labor Union here in the City of Knoxville. He was a member of the Brotherhood of Railroad Locomotive Engineers. I have always been in favor of union men. There is no arbitrary ruling about the matter. Nobody works any

[fol. 477] harder than I do, talking about a working man. A man belongs to the union, he has a perfect right to belong. When a strike is called the union goes out. We see in the papers every day where this man goes out, this organization goes out, that organization goes out, because of a strike being called, not by his union but by some other union. And consequently I say that a man that is an active member of a union is interested in the outcome of this case, because the union is involved. Now that is my reason. I may be wrong, but that is the way I see it, and in other words, a citizen who is an active member of a union—this man here while ago that formerly belonged to the union and wasn't active and wasn't participating, then I held he was a competent juror. He is not controlled by the action of the union. He didn't have to go out. He didn't have to cross a picket line, or refuse to cross a picket line.

"I feel that is about it. I think the difference, as you see, as far as the union is concerned: The management is an entirely separate proposition. The owners never come out. They are not organized. Because there is a strike we will say at a coal mine, the people that run the zinc company don't say, 'Now you folds get out.' It is altogether different. I just can't see that there could be an similarity. Draw out 50 names and let's go."

[fol. 478] It is submitted that the conclusions and distinctions drawn by the Honorable Court below are erroneous in fact and law. Although the Trial Court had no intentions to so hold, it is felt that such reasoning would indicate that labor union sanction crimes which these defendants are charged with, and that the individual members of the unions are so indoctrinated that they could not convict a fellow union member who was charged with the commission of a crime.

We respectfully submit that the mere fact laboring men join together for the purposes of collective bargaining with their employers for better wages, working conditions, etc., does not mean that they would in any way be disqualified to sit as a juror in this case where two union men charged with violating the laws of Tennessee. The defendants fur-

their feel that in the absence of clear and convincing proof, membership in a labor union in no way prevents a person from exercising his legal duty to sit as an unbiased juror.

The defendant's are of the opinion that the ruling of the court below is contrary to the settled law. It is submitted that the applicable law is summarized by the author in *31 ALR 411 at page 420.*

> "Membership in a secret order known as the United Mine Workers of America was held in *Noonan* v. *Saline Coal Co.* (1912), 173 Ill. App. 541, not to be a ground of challenge for cause in an action between a member of said organization and an employer where the challenged jurors lacked none of the qualifications fixed by the statute; nor were interested in the result, nor had formed or expressed an opinion on the merits of [fol. 479] the case, the objects and purposes of the association being mutual protection of its members in their contractual and business relations with the employer; there being nothing in their oath as members of such organizations which would interfere with their duties as jurors in a case between a member and an operator, each of the challenged jurors stating they could and would try the case fairly and impartially."

In the case of *Alabama Fuel & Iron Co.* v. *Pouraski*, 166 So. 782; 232 Ala. 66, the defendant was charged with assault and battery growing out of a labor dispute, and thus contended a juror who was a member of the union should be challenged for cause. The Supreme Court of Alabama stated as follows in ruling that the juror should not be challenged for cause:

> "The juror responded to inquiry from the court to the effect that he could render a fair trial and verdict notwithstanding such affiliation, and in effect that he had no feeling of prejudice of any kind against the defendant."

The general principal seems well settled that mere membership in a particular order or organization is not ground for challenge for cause unless it is shown that the individual juror is biased or that the organization is unlawful in its objects or purpose.

See 50 C.J.S. Section 229, page 976.

[fol. 480] In conclusion, the plaintiffs-in-error submit that if the Trial Court erred in sustaining the challenges for cause, then the same was highly prejudical. The State, in accordance with the statutory authority, was granted twenty-four peremptory challenges. The State exercised thirteen of their challenges. Thus the fourteen jurors who were challenged for cause would in effect amount to twenty-seven peremptory challenges, which according to the case of *Vines* v. *State*, 190 Tenn. 644, would be error.

It is respectfully urged that this assignment of error be sustained, the Trial Court's ruling be reversed and this case be remanded for a new trial.

[fol. 481]

II

The Honorable Trial Court was in error in not requiring the State to make an election as to the count or counts that defendants would be put to trial on, when said motion was seasonably made by the defendants.

A

The Honorable Trial Court erred in failing to sustain defendants' motion to quash the indictment, when seasonable made.

Argument

The indictment charges the same offense to have been in violation of two separate and distinct statutes, with different penalties and both based upon the same state of facts, and the Court should have required an election.

III

The Honorable Trial Court erred in admitting the statements of the defendants, Nelson, Hatton and Craig, when seasonable objected to, because said statements were largely irrelevant and immaterial and were the conclusions of the District Attorney General, obtained by means of cross-examination, oppression mental cruelty and duress, and obtained in violation of the Bill of rights and of the due process clause of the Fourteenth and Fifth Amendments, and because said statements were required before defendants were permitted to confer with counsel and because the de-

fendants were required to change their statements against their wills, as is by the record shown.

[fol. 482] Because the physical facts and uncontradicted evidence of the state's witnesses, including the Attorney General, and the sisters of the defendant; Nelson, and others present, and these defendants were not in possession of Mental Freedom to confess or deny the accusation in the presence of the officers, including the Attorney General, at the time of their questioning, while in custody of the police officers and after being refused to consult with their counsel, thus doing violence to the due process clause of the Constitution.

IV

The Honorable Trial Court was in error in refusing to permit the introduction of the testimony of the witnesses as to the way and manner of procuring the said confessions or statements in their evidence before the jury. When said evidence was offered, it showed that the statements were not freely, voluntarily, and understandingly made, and said evidence certainly would have weight as to the believability of said confessions by the jury, and the Honorable Trial Court so instructed the Jury, thought the testimony was excluded from them upon the ground it only affected the admission of said statements and did not concern the Jury, the rule in Tennessee being that the weight of a confession is for the Jury's determination and its admissibility is a preliminary question to be determined by the Trial Court.

[fol. 483] Argument

Inasmuch as Assignments of Error III and IV pertain to the same subject-matter, these two assignments will be discussed together.

It is respectfully submitted that this Assignment of Error involves a construction of *Wynn* v. *State*, 181 Tenn. 325.

The question presented to the Court by this Assignment of Error is:

After the Trial Court has conducted a preliminary inquiry in the absence of the jury upon the admissibility of a confession, and has ruled that such confession is admissible, can the same evidence and all other circumstances relating to the procuring of the confession be introduced be-

fore the jury to aid the jury in their determination of the weight to be given the confession?

At the trial of this cause the Trial Court conducted a preliminary inquiry into the question of the admissibility of the confessions of the plaintiffs-in-error in the absence of the jury, following which preliminary inquiry he thereupon ruled that said confessions were admissible as evidence.

[fol. 484] Plaintiffs-in-error recognize that in conducting such preliminary inquiry to determine the admissibility as evidence of the confessions, the Trial Court followed the correct rule of law in Tennessee.

However, upon introduction of the confessions before the jury, when the plaintiffs-in-error sought to examine witnesses and introduce testimony relative to the circumstances of the procuring of the confessions, the Trial Court thereupon held that such examination, testimony and evidence went to the question of whether or not the confessions were voluntary or involuntary, that he had already determined that question, and that such evidence could not be introduced before the jury.

The plaintiffs-in-error respectfully insisted that all evidence of the circumstances under which the confessions were procured was admissible before the jury, *because such evidence and circumstances went to the weight of the confessions*, and it is solely within the province of the jury to determine the weight to be given the confessions. (Emphasis Supplied)

In *Wynn* v. *State*, supra, the Supreme Court held:

> "When the confession was offered in evidence by one of the officers to whom it was made, objection was raised to its admission and the court entered into a preliminary inquiry to determine that question. This was proper practice. * * *
>
> "A confession being admitted, *its weight is of course a matter for the jury.* That is, the jury is to determine whether defendant made the confession and whether the statements contained in it are true. To aid them in resolving these questions *the jury may hear evidence of the circumstances under which the confession was procured.*" (Emphasis Supplied)

The learned Trial Court, however, construed *Wynn* v. *State*, supra, to mean that all circumstances surrounding [fol. 485] the confessions relating to force, fraud, or fear, promise of immunity, etc., were not competent to go before the jury, because such circumstances went to the question of whether or not the confessions were voluntary or involuntary, and this question had been determined by the Trial Court upon preliminary inquiry.

It was, and is now, respectfully contended by the Plaintiffs-in-error that the holding of this Honorable Court in *Wynn* v. *State*, *supra*, permits all evidence of circumstances relating to the procuring of confessions to be introduced before the jury, not for the purpose of having the jury decide whether or not the confessions were voluntary or involuntary, but to enable the jury to pass upon the weight to be given the confessions.

The Trial Court failed to make a distinction that, with respect to confessions, the same evidence may serve a dual purpose—first, to enable the Trial Court to determine a confession's admissibility as evidence on preliminary inquiry, and secondly, to enable the jury to determine the weight to be given to the confession once it is admitted.

The ruling of the Trial Court, and his construction of *Wynn* v. *State*, *supra*, and the prohibitions and limitations placed upon the plaintiffs-in-error in inquiring into the circumstances of the confessions before the jury is shown in the following:

> "The Court: Now, Mr. Atkins, I see your construction of this case and mine are entirely different, and I am afraid that this misconeption either by you or me is the cause of so much delay in the trial of this law- [fol. 486] suit. (Reading 181 Tenn., p. 328 and discussing other cases.) The only thing under this case the jury can consider is whether or not he made it and whether if he made it it is true. I have told the jury that time and time again. I will continue to tell them that and I will charge them that when I charge the jury. But I am frank to say that the words of the Supreme Court is so plain that the jury cannot consider whether or not it was obtained by hope or fear that you

wouldn't proceed with such question, because the jury cannot consider it for that purpose.

"Mr. Atkins, Now, honestely, this is in my mind, and no facetious, what does the court mean in that opinion when they say you can prove the circumstances under which it was obtained if they don't mean you can prove by witnesses just what occurred when the statement was made or before it was made? What else could you say they meant by that statement?

"The Court: As I said in the opening statement before the jury was brought in the Supreme Court would have saved a lot of time and saved us a lot of grief if they had set out what they meant. I am frank to say I don't know, but I have consequently followed the practice of letting you inquire into it where it involves a question of truth or falsity or whether or not it was made, but whether it was forced out of him is not a question for the jury. What has keeping a man in jail [fol. 487] and not letting him talk to anybody, and that is my question all the time, what would keeping a man in jail incommunicado 22 hours have to do with whether his statement is true or false?

"Mr. Atkins: If the court meant as we think it did, what it said, if a man made a statement for the purpose of getting out of jail or some purpose like that, would the court say——

"The Court: That is a question for the court to determine. The jury cannot determine anything about it, and don't start arguing before the jury anything like that, the court will stop you.

"Mr. Atkins: We have nothing but an exception to the ruling. I am going to argue to the jury these statements are false, and try by best to convince them they are.

"The Court: You have that right. I never said anything about you not arguing they are false, I said force. If I didn't I meant to say it, whether their confession was obtained by force. On the question of whether or not he made it, and whether or not it is true, certainly you have a right to argue it, but don't argue to this jury it was forced because I will stop you in you start.

I think without objection it is the duty of the court to do so, because the case says that.

Tr., Pages 674-676

[fol. 488] Mr. Atkins: I don't see how they could pass on the weight to give it without having all the circumstances.

"The Court: Any circumstances involving force, and that is where the line is drawn there, I wish the Supreme Court would clarify it for us; any circumstance showing force, fraud or fear, matters of that sort, promise of immunity etc., those are not component to go before the jury; and that is why a while ago I raised the question before noon and said that to me it seemed that the purpose of asking of those questions was to determine, was to have the jury determine a matter that the court had already determined, a matter solely for the court to determine; and we had a little discussion about it then. But as I say you are entitled to go on and ask questions about the manner in which it is obtained and how it was obtained, but whenever that question requires an answer that goes to the point of force or threats or promises or hope of reward or immunity or anything like that, it is a matter not competent for the jury to hear and I will sustain the objection.

"I am certain, and it has been my practice all the time, to permit and you are entitled to bring it in on the question of whether or not he made the statement, and if he made it whether or not it is *ture*, but not on the question of force or violence or immunity or promise or hope of reward. That is where we differ, because that is a matter for the court.

[fol. 489] "Now as I say, the defendant don't deny making the statement. There is no issue here as to whether or not he made it. There is only one issue, as to whether or not it is true or false. I can't see how proof that he was up there in jail for however many days, without or with lawyers, would have anything to do with its truth or falsity. I can't see it.

"Mr. Atkins: We except to the court's ruling, and if I am correct the defendant says he didn't read it, he signed it but that was his testimony."

Tr., Pages 677-678.

Again, when counsel for the plaintiffs-in-error was attempting to cross-examine a witness, Reynolds, who was present in the attorney general's office at the time of the signing of the confession by the plaintiff-in-error, Hatton, the following occurred:

"Q. Now what room were you in back in the General's office?

"A. We were in his office.

"Q. How big a room is that where these eight persons—Objected to.

"The Court: Yes, gentlemen, that is going to — a question that is for the court to determine. I don't see where that would throw any light on the subject the jury has to consider. Sustained

"Q. How were they arranged, was there a desk in there?

"A. Yes sir.

"Q. How were they all arranged about this desk? I mean by all, I mean the Attorney General, Gen. Clements, where was he located?

[fol. 490] "Gen. Clements: I renew the objection.

"The Court: I can't see the materiality, Mr. Atkins, I declare I can't. Sustain the objection.

"Mr. Atkins: We except.

"Q. Where was the defendant sitting, or was he standing or sitting?

"A. He was sitting.

"Q. Were all the gentlemen there in the room, including the attorney general sitting?

"Gen. Clements: I renew the objection.

"The Court: Sustained. It is immaterial, entirely immaterial.

Exception noted.

"Q. Don't you know that Attorney General wasn't sitting, but that he got up into the face of the defendant, Hatton, and pointed his finger at him and told him what———

Objected to.

"The Court: Gentlemen I know that question is not competent, and sustain in the objection of it, and you

will not consider it, because that is going to the question of whether or not it was forcibly or voluntarily made, and jury will not determine that question.

Exception noted."

Tr., Pages 700-701.

* * * * * * * *

In the cross-examination of the attorney general, Hal H. Clements, with respect to the attorney general's interrogation of Gamel Craig, the co-defendant, who was ac- [fol. 491] quitted, during the trial the following occurred:

"Q. Were any of those present there with you armed?

"A. I don't have any independent recollection, but I don't see where it is competent.

"The Court: Just a minute. Gentlemen, you will disregard that question. It goes to whether or not it was voluntary or involuntarily made, and is a matter the court has to pass on and has passed on, and the jury has nothing to do with it. The only consideration for this jury is whether or not he made the statement, and whether or not if made it is true or false, and that is all.

"Mr. Atkins: We except. It goes to the weight of the testimony.

"The Court: Go ahead.

"Q. I believe you further stated you could see him quivering, and his pencil——

"The Court: The jury will not consider that statement. Mr. Atkins, I want you to confine yourself to questions which go to the question of whether or not this statement was made, and whether or not if made it was true or false. Those are matters that go. As to whether or not it was voluntarily or involuntarily made, the jury will not determine that question, it is for the court to determine.

[fol. 492] "Mr. Atkins: Very well, we except, your Honor.

"The Court: That is your protection in the record.

"Mr. Atkins: I thot we misunderstood each other, but I don't think we do now.

"The Court: No, we don't. You have your exceptions in the record.

"Mr. Atkins: Do I understand then the circumstances under which the statement was made is not competent.

"The Court: With reference to whether or not it was made, and if made whether or not it is true you may ask anything and everything you desire to ask. I do not attempt in any way to limit or intimate you are limited from asking such question, but on the question of whether or not it was forcibly or voluntarily made then that is a matter that the jury must not consider under the words of the Supreme Court. That is for the court to determine and the question should not be asked.

"Mr. Atkins: That is all, unless I can inquire into the whole circumstance I don't see the benefit of asking questions that are overruled.

"The Court: Anything further?

"Gen. Clements: Nothing further at this time."

Tr., Pages 860-861.

[fol. 493] After the State had rested and before the introduction of any witnesses on testimony by the defense, once again inquiry was made of the Trial Court's ruling upon evidence of the circumstances relating to the obtaining of the confessions, which appears in the transcript at pages 874-875 as follows:

"Mr. Atkins: Before the jury comes in, your Honor, this question is in our minds, Do I understand that the evidence I believe of Mr. Nelson's wife, pertaining to the obtaining of his statement would not be competent under the court's holding?

"The Court: Before me on the proposition on the question of whether it was obtained by duress or threats or promises gather, whether it was voluntary or involuntary that is right.

"Mr. Atkins: Your Honor holds that that testimony, the court knows what it is, is not competent?

"The Court: Yes, sir.

"Mr. Etkins: In view of that holding, and the court

knows the woman's condition, we will not recall her on it.

"The Court: All right. I hold it is on the proposition of whether it was voluntarily or involuntarily made, and that is a question for the court and not the jury.

"Mr. Atkins: The court would say that was the purpose of the testimony and would not affect the weight to be given?

[fol. 494] "The Court: That is right, that is my opinion.

"Mr. Atkins: We believe we offered it and the court ruled on it.

"The Court: It would show weight, but not weight as to whether or not it was made if made whether or not it was true. That is the point. In other words, it is only competent on the question of whether it was voluntarily or involuntarily made

"Mr. Atkins: As I understood under the court's ruling that testimony would not be competent before the jury?

"The Court: That is right.

"Mr. Atkins: That is the question, and of course we except and show they are available for that purpose, and we are ready to proceed."

Tr., Pages 874-875

It is respectfully urged that the foregoing amply illustrates the prejudicial construction placed upon *Wynn* v. *State, supra*, by the Trial Court in this cause.

In addition to the above, as a matter of further showing the Trial Court's restrictions imposed upon the plaintiffs-in-error before the jury upon any circumstances surrounding the obtaining of the confessions, one of the attorneys for the plaintiffs-in-error while arguing the case of the jury, commented upon the fact that a large number of police officers were in the room when one of the confessions was procured, and was promptly interrupted by the Trial Court and instructed not to comment upon such matter to the jury.

[fol. 495] From the foregoing comments of the Trial Court, it is apparent that he has construed the holding of this Honorable Court to mean that a restriction is

laced upon the defendants in introducing testimony before he jury upon the circumstances surrounding the pro-uring of a confession—a restriction against any circum-tances which go to promise of reward, fear, fraud or uress, etc.

We do not believe that this is the true meaning of the pinion by Chief Justice Green in the Wynn case. Such onstruction would impose a limitation upon a defendant's ights which would be of the utmost gravity in connection ith his constitutional guaranty that no one may be com-elled to give evidence against himself.

The Trial Court, under such construction as made below, akes it upon himself to pass upon the weight of the con-ession by his limiting of the circumstances which may be hown by the defendants, and thus he has invaded the rovince of the jury.

It is respectfully submitted that we have found no ase which sustains the position of the Trial Court in this ause.

Indeed, the cases in other jurisdictions, which follow the ennessee rule of having the Court pass upon the ques-on of voluntariness or involuntariness of a confession a preliminary inquiry, unanimously follow the practice f allowing all circumstances involved in the giving of the onfession to be submitted to the jury so that *the jury may etermine the weight to be given the confession.* (Em-hasis Supplied).

The question before the Court in this assignment has been nswered in other jurisdictions in those cases usually in-olving the issue of whether or not the court or jury shall [fol. 496] determine the voluntariness of a confession. An nnotation of these cases appears in 170 A.L.R. 56.

The following editorial comment is set forth at 170 A.L.R. 0:

> "It is a significant fact, however, that in those jurisdictions committed to this basic view, (of the court determining the voluntariness of a confession), the practice; where the evidence in this regard is in dispute, is to submit to the jury, along with the con-fession, *all the evidence adduced at the preliminary inquiry by the Court concerning the circumstances* under which the confession was given, not for the pur-

pose of determining its voluntariness and therefore its competency, *but merely that the jury may determine therefrom the weight or credibility of the confession* upon the question of the defendant's guilt. (Emphasis Supplied).

170 A.L.R. 570

The correct rule for the trial court to follow is well-stated in *State* v. *Crank*, *105 Utah 332*, which is annotated at *170 A.L.R. 542*, where the Court said:

"'In determining admissibility:

'(1) The judge must hear the defendant's evidence (including evidence from cross-examination of the prosecution's witnesses) upon the issue of voluntariness; although under the heterodox rule this could logically be dispensed with.

'(2) The jury, during the hearing of this evidence, may be withdrawn, as is proper during all proof and arguments upon questions of admissibility.

'(3) But, when a confession is ruled to be admissible, *the same evidence and all other circumstances affecting the weight of the confession may be introduced for the jury's ultimate consideration.*

Of course there is nothing to prevent the jury from determining for itself whether it was voluntary and if it so determines ignoring it, or giving so little [fol. 497] weight to it because of the circumstances under which it was obtained, as practically to ignore it. But the instructions of the court will be different in the case where it is held that the question of voluntariness is first for the court and then, if the evidence is in dispute, again for the jury than they would be in the case where the question is one finally for the court but after the confession is admitted, evidence of the circumstances under which it was taken is given to the jury. In the latter case the instruction would be to consider such evidence for the purpose of determining what weight should be given it. As intimated by the main opinion the end result as far as the jury mind is concerned will be much the same. The important thing is that the judge be convinced that the con-

fession is voluntary before he gives it to the jury. He holds the trump card. Once given to the jury if it was in reality not voluntarily given, much harm may be done." (Emphasis Supplied).

In the A. L. R. Annotation of *State* v. *Crank, supra,* Tennessee is aligned as one of 12 States following the rule of requiring the Court to pass upon the voluntariness of a confessions, but we found no case in which a limitation was imposed upon introduction of evidence before the jury of the circumstances of the giving of the confession. Practically all of the cases expressly stated such evidence could go before the jury for the weight and credibility to be given the confession by the jury; as shown by the following decisions in the Annotation at 170 A.L.R. 567:

"The duty of determining whether an admission or confession of the defendant was voluntary rests with the trial court; and when, after inquiry, the court determines the admissibility, *the jury must accept the evidence, and their duty is confined to a consideration of its credibility. Stone* v. *State (1922) 208 Ala. 50, 93 So. 706* (Emphasis Supplied.)

* * * * * * *

"It was said in *Johnson* v. *State (1942) 242 Ala 278, 5 So2d 632 (Writ of certiorari denied in (1942) 316 US 693, 86 L ed 1763, 62 S Ct 1299* which has rehearing denied in *(1942) 316 US 713, 86 L ed 1778, 62 S Ct 1310)* that after confessions have been admitted by the court, *the jury may consider the circumstances under which the confessions were obtained, and the appliances by which they were elicited, including the situation and mutual relation of the parties in exer-* [fol. 498] *cising their exclusive prerogative of determining the credibility of the evidence or the weight to which it is properly entitled in controlling the formation of the verdict.* See also, to the same effect, *Phillips* v. *State (1947)—Ala—28 So2d 542"* (Emphasis Supplied)

* * * * * * *

"The question whether the voluntariness of a confession should properly be submitted to the jury after its admission in evidence by the trial court following a preliminary examination in this regard has not been directly discussed in any of the later decisions in this jurisdiction. However, the view taken by those cases discussed in the earlier annotation in 85 ALR at p 875, that it is the court's duty to determine the question of voluntariness, which does not shift to the jury, is supported in other cases which hold or recognize that the admissibility of an extrajudicial confession, which includes the question of voluntariness, is to be determined solely by the trial judge, *and if the confession is held to be admissible, the jury may consider the method and circumstances under which the confession is obtained to determine its 'credibility'. Bates* v. *State (1919) 78 Fla 672, 84 So 373; Davis* v. *State (1925) 90 Fla 317, 105 So 843; Nickels* v. *State (1925) 90 Fla 659, 106 So 479; Williams* v. *State (1945) 156 Fla 300, 22 Soed 821.*". (Emphasis Supplied)

* * * * * * *

"Thus, in People v. Hurry (111) supra, the court said that when confessions have been received in evidence, the court can properly refuse to give instructions to the jury that the confessions should not be considered, since the question of their admissibility is one for the court, *although the wright to be given such confessions is entirely for the jury.*" (Emphasis Supplied)

* * * * * * *

"Thus, in Demby v. State (1946)—Md.-, 48 A2d 586, the court said: 'In almost every serious criminal case where a confession is offered in evidence, its admissibility is questioned. Thile every care should be taken not to force or persuade a prisoner to incriminate himself while he is being detained, and has no counsel to advise him, never-the-lece, if he chooses to unburden himself and tell the truth when he is questioned, there is no reason not to receive this evidence,

if it is given voluntarily. The difficulty arises because, when the trial occurs, the accused is almost always [fol. 499] ready to say that the incriminating statements he has made were not obtained voluntarily, but were obtained as a result of some form of coercion or persuasion. The trial judge then has to determine from his story and the testimony of the officers who took the confession, whether there is any reason to refuse the evidence. *The first question is the admissibility of the confession, but the jury, or, as in this case, the court sitting as a jury, is not barred by its admission from passing on the circumstances under which it was obtained or its credibility. They may disregard it entirely in reaching their verdict.*" (Emphasis Supplied)

* * * * * * * *

"The later cases in this jurisdiction have continued to support the view adhered to in earlier cases to the effect that the question of voluntariness is solely for the trial court, and that the jury may not be instructed to disregard the confessions entirely if found to be involuntary, *although the circumstances surrounding the giving of the confession may be given to the jury for its consideration in determining the weight and credibility to be attached thereto. Brooks* v. *State (1937) 178 Miss 575, 173 So 409; Humphries* v. *State (1938) 181 Miss 325, 179 So 561.*" (Emphasis Supplied)

* * * * * * * *

"And it may be noted that in Williams v. State (1943); Miss 12 So 2d 156, the court apparently approved a statement made in an earlier case to the effect that the admissibility of a confession is for the determination of a trial judge, *but, when admitted, that the jury may consider it in the light of the evidence by which it was obtained and give it such weight and credibility as they think it is entitled to.*" (Emphasis Supplied)

All of the above cases provide ample support for the contention of the plaintiffs-in-error that they were entitled

to introduce evidence before the jury regarding all the circumstances of the procuring of these confessions, so that the jury may determine the weight to be given the confessions.

As was pointed out in *State v. Crank*, supra, the important fact of the rule requiring the trial judge to pass upon admissibility of a confession is to provide an additional safeguard for the accused. That is why he holds the "trump card" upon admissibility, because he is learned in the law.

[fol. 500] But such rule never should be extended to permit the trial judge to withhold evidence from the jury of all the circumstances involved in the procuring of a confession, because then he takes away from the jury its historic right to weigh all of the testimony upon the question of guilt or innocence.

What circumstance the trial judge may consider unimportant in the procuring of a confession may weigh heavily in the deliberations of a lay person on the jury.

The plaintiffs in error were completely shackled in their defense by the ruling of the trial court. Confronted with sworn confessions, they were told by the Court that they could not go into the circumstances of these confessions, because many of the questions and much of the testimony had been previously heard by the Court in the absence of the jury and bore upon promise of immunity, fear, force, etc.

Thus the plaintiffs in error were prevented from submitting to the jury the testimony of the wife of the plaintiff in error, Nelson, that she asked her husband to sign a statement because she had been told he would get off lighter; the testimony of the plaintiff in error, Hatton, as to the effect upon him of a visit to the jail cell by the Mayor of Knoxville, with his father being employed by the City of Knoxville; the large number of officers present when the statements were signed, and a multitude of other circumstances which were shown on preliminary inquiry, but was withheld from the jury by the trial court.

To permit the trial court's ruling to stand would be an opening of the door in taking away from the jury its historic and lawful duty of weighing the testimony. The ruling was prejudicial to the plaintiffs in error and prevented their having a fair trial.

[fol. 501]. It is respectfully urged that this Honorable Court sustain this assignment of error, reverse the ruling of the learned Trial Court, and grant the plaintiffs-in-error a new trial.

[fol. 502] V

The Honorable Trial Court was in error in the admission of the testimony of acts of violence during the strike, other than those for which the defendants were put to trial, and although this evidence was withdrawn from the jury, there was proof that one of the defendants had previously worked in Roane County where No. 33 is the car license prefix and the evidence showed that one of the defendant's automobile had Roane County license on it.

VI

Because the defendants requested counsel and were refused the right to see counsel or to have counsel present at the questioning, the State's Attorney well knowing that attorneys were making an effort to contact the defendants, and he issued specific orders denying counsel the right to see the defendants. Therefore, there did not exist that fundamental fairness essential to the very concept of justice and the said evidence was in no sense a free and voluntary confession. The voluntary or involuntary character of an admission or confession is to be determined as a conclusion whether the accused at the time he confesses is in possession of MENTAL FREEDOM to confess or deny a suspected participation in a crime.

VII

The Honorable Trial Court erred in admitting in evidence and allowing to be filed a gallon of sulphuric acid, permitting certain demonstrations which were very prejudicial, with testimony as to its effect on the person, clothing, cars, etc., when same was immaterial, irrelevant and in no wise connected with any issue involved in the law suit.

[fol. 503] VIII

Because there was no competent, credible and believable testimony upon which to predicate the verdict of guilty.

IX

The competent and legal evidence does not support the verdict and finding of the jury, but preponderates against it and in favor of the innocence of the defendants.

X

Because the admission of incompetent, prejudicial statements before the Jury affected the verdict against them.

[fols. 504-515] Conclusion

Each of the foregoing Assignments of Error in this Brief and in the Motion for new trial were presented and argued at length before the Honorable Trial Judge who overruled said motion and pronounced sentence on the defendants.

Whereupon, the defendants and each of them, appealed their case to this Honorable Court and filed within the time allowed, a complete transcript of the record, pleadings and papers, including all the testimony in said cause.

The defendants and each of them, therefore, respectfully request this Honorable Court to reverse their case and remand it to the Trial Court, that the Errors complained of may be corrected in the premises.

Respectfully submitted, F. C. Smith, Jr., B. R. McGee, Hobart F. Atkins, Counsel for Plaintiffs-in-Error.

[fol. 516] IN SUPREME COURT OF TENNESSEE

Knox Criminal, Hon. J. Fred Bibb, Judge

GERALD WILLIAM NELSON and JOHN E. HATTON

v.

STATE OF TENNESSEE

For Plaintiff in Error: Hobart Atkins, B. Rex McGee, R. C. Smith, Jr., Knoxville, Tennessee.

For the State: Nat Tipton, Advocate General, Nashville, Tennessee.

OPINION--July 20, 1956

These two men were indicted for the violation of Section 10895.1 et seq. of the 1950 Code Supplement, T.C.A. 39-1401 et seq., which sections make it a felony to damage or destroy real or personal property by means of explosives. They were tried jointly by consent on two separate indictments, were found guilty and their sentence was fixed at not more than three (3) years upon each indictment, from which they have appealed. A third person, Craig, was indicted and tried as an accessory before the fact but was acquitted by the jury.

[fol. 517] The indictments arose out of two occurrences in May, 1955, during a strike of certain employees of the Southern Bell Telephone Company. The defendants were former employees who were on strike. Early on the morning of May 5th two connection boxes located on telephone poles eight (8) or nine (9) feet above the ground were dynamited. One of them was on the Asheville Highway in Knox County nearby Chilhowee School. The other was on Johnson Street in the Lonsdale Section of Knoxville. As a result of the first the Telephone Company property and the school property were damaged. As a result of the other explosion the property of the Telephone Company and that of an individual were damaged. The first explosion occurred near the school at about 4:15 a.m. and the second one on Johnson Street at about 5:00 a.m. About fifteen (15) minutes thereafter an officer arrived and detected the odor of dynamite in the air. Another witness, Beal, was

an employee of a filling station located on the Asheville Highway, about a half a mile west of the school building. Shortly before the explosion two men whom he later identified as being the defendants stopped at his station and bought some gas. They were driving a Chevrolet car. After obtaining the gasoline, they drove east toward Chilhowee School and about fifteen (15) minutes later witness heard an explosion. He went out to the highway at once and very shortly thereafter noticed this same automobile, which has stopped at the station a short while before, as [fol. 518] it passed him going west at a very high rate of speed. He immediately telephoned a man named Atchley, a friend of his who operated a station still further west, so that the latter might be on the lookout so as to obtain the license number of the car. Atchley went out and when the car passed at a high rate of speed he was only able to obtain the prefix number, which was 33, denoting Roane County.

The county officer, above mentioned, who arrived there shortly after the explosion and smelled dynamite, saw two men drive up to the scene near the Chilhowee School and they answered the description that had been given him of the men in the automobile. He therefore arrested them, took them to the county jail and notified the District Attorney General. After talking with both of these suspects the Attorney General remanded them to jail with instructions to let no one talk to them.

The authorities then made a searching examination of the Chilhowee School vicinity and it was found that the telephone pole on which the box had been located bore marks of having been climbed recently with linemen's climbing irons, and in one of the holes made by these irons a piece of leather was found. In the automobile which was the property of the defendant Hatton, there was found a hacksaw and a pair of climbing irons. Later on a knife was taken from Nelson. One blade of this knife had some black gummy material on it. On further examination of [fol. 519] the shoes of Hatton this piece of leather seemed to match a torn place in them. He was then required to remove his clothes for examination.

The authorities seemed to be pursuing the investigation very rapidly because all this occurred on the same day of

the explosion. The above mentioned material, a piece of leather and a hacksaw, Hatton's clothes and Nelson's knife, was sent to the laboratory of the F. B. I., together with some wood from the pole on which this box was located. Later that day a piece of fuse found at the scene of this explosion was also sent to the F. B. I.

The tests made by the F. B. I. disclosed that this piece of leather had come from Hatton's shoe, that in his trousers were found sliyers of wood of the same composition as the telephone pole on which the box was located and that the knife and hacksaw blade both contained fragments of fuse of the same type as that found at the scene.

In the afternoon of the same day the Attorney General confronted Nelson with the above mentioned evidence and about 3:45 p. m. Nelson signed a confession in which he admitted his guilt. The next morning about 9:00 o'clock when Hatton was confronted with the evidence of guilt and with Nelson's confession he confessed to his part in the transaction. As a part of Hatton's confession he disclosed [fol. 520] that he had hidden some fuse and dynamite near another school in Knoxville, and thereafter the officers with Hatton's assistance found this material at that location.

Neither defendant took the stand to testify before the jury, contenting themselves only with testifying before the judge in resisting the admissibility of the confessions.

The defendants have filed several assignments of error, but they have argued only two propositions as a ground for reversal. One of these grounds involves the construction of our case of *Wynn* v. *State*, 181 Tenn., 325, and counsel presents the question in this form: "After the trial court has conducted a preliminary hearing in the absence of the jury upon the admissibility of a confession, and has ruled that such confession is admissible, can the same evidence and all other circumstances relating to the procuring of the confession be introduced before the jury to aid the jury in their determination of the weight to be given the confession?"

It appears that the court and counsel were in agreement that the only thing that the jury can consider is whether or not the accused made the confession and, if so, whether it is true, that is, stated another way, the question of admissibility is a question for the court alone to decide pre-

liminarily, and that having held that the same was admis-
[fol. 521] sible because voluntary, it then remained for the jury to determine its weight and credibility. However, the court was of the opinion and so ruled, that, since under the rule in Tennessee the question voluntariness is for the court alone, none of the evidence given on the preliminary examination before the judge relating to hope or fear, or promise or threat is admissible before the jury.

With deference to the above trial judge we believe that he was in error in this ruling. In *Winn* v. *State*, supra, it will be noticed that after the judge heard the evidence and ruled that the confession was voluntary and therefore admissible the opinion states that the accused parties then testified before the jury that they were abused and mistreated by the officers, which the officers testified in denial of such accusation.

In *Steele* v. *State*, 189 Tenn., 424, 431, this Court said:

> "The next complaint is that the trial court was in error in not permitting the jury to hear all the witnesses with reference to the circumstances under which the confessions were made. The trial court followed the approved procedure in this State and conducted a preliminary hearing at which both the prosecution and [fol. 522] the defendants were allowed to present evidence with reference to the admissibility of the confessions. The trial judge held the confessions admissible, and thereupon the testimony of the witnesses as to such confessions was heard in the presence of the jury. Counsel for defendants made no effort to cross-examine the witnesses with reference to the circumstances under which the confessions were made, and if counsel desired at that time to lay before the jury such circumstances, it was their duty to develop them by cross-examination of the witnesses, and the trial judge will not be placed in error merely because of his own volition he did not undertake the examination of such witnesses to develop such circumstances."

Then in *Taylor* v. *State*, 191 Tenn., 670, 679, the Court said:

> "Contention is further made that Taylor was under duress because he was not allowed to call his lawyer;

'that he was told 'he didn't need a lawyer' and that 'a lawyer would not do him any good' *ect.* This, however, was expressly denied by those present and pre-[fol. 523] sented an issue of fact for the court in deciding the admissibility of the confession, and also the weight to be given the confession by the jury as to its truth *of* falsity. * * *"

Thereafter followed the type of examination with reference to duress as is alleged in part in this case.

The question is fully annotated in 170 A. L. R., 567, and the editorial comment on page 570 is in accord with the view above expressed.

Whether or not this ruling of the court presents a reversible error, however, is quite a different question. After the court had ruled that the defense could not show any evidence of inducements by hope or fear, or force, etc., he stated: "But as I say you are entitled to go on and ask questions about the manner in which it is obtained and how it was obtained, but whenever that question requires an answer that goes to the point of force or threats or promises or hope of reward or immunity or anything like that, it is a matter not competent for the jury to hear and I will sustain the objection."

Subsequent to this ruling and upon the State resting its case counsel for the defendants did not offer any evidence along this line at all with reference to the circumstances but contended himself with a number of character witnesses' testimony.

[fol. 524] Therefore the failure of counsel to preserve the evidence that he intended to offer before the jury leaves us where we are unable to say whether the rulings of the judge on any objections by the State would have been prejudical or not. A great deal of testimony by the two defendants and by some of their relatives appears in the transcript of the preliminary hearing which was had before the court on the question of the admissibility of the statements, and certainly not all of it could be incompetent on any basis. We do not know whether counsel for defendants would have offered all of the same testimony on parts of it or what part. Nor do we know what objections would have been made by the State, nor what rulings would have been made by the

trial judge as to any part to which objection was made by the State.

The burden rests upon the plaintiff in error to show that the erroneous ruling of the court was prejudicial. This has not been done for the reasons above stated and we therefore must overrule the assignments based on this proposition.

The second error that is briefed and argued is embodied in the question as stated by the counsel for defendants as follows: "Does mere membership in a labor union, where no bias or prejudice is shown, constitute sufficient grounds [fol. 525] to sustain a challenge for cause by the State against prospective jurors in the trial of an individual for a crime growing out of a l[illegible] dispute?"

The court sustained a challenge for cause by the State against fourteen prospective jurors upon the ground that they were or had been members of labor unions. In doing so the court stated: "It is my opinion that if a person, a member of a union which in event of a strike would require them, that is, presently a member of a union, not formerly but presently, which would require them to go out on a similar strike, I think are disqualified, and if you ask for a challenge on that reason the challenge will be sustained."

Further the court said: "If he is an active member of an affiliated union as I understand, then he had an interest in the case and is not a qualified juror. That is what I have been holding and still hold."

Then the defense counsel inquired:

> "Mr. Smith: Is that a member of any union?
>
> The Court: Yes, sir, any union, hodcarriers or whatever."

We think the court's ruling was too broad. The subject is rather fully covered in 50 C. J. S., 976, Section 229, wherein it is said:

> [fol. 526] "The fact that a person is a member of a particular order, association, or other organization does not, as a general rule, of itself render such person incompetent as a juror."

This is the rule applied in the case of all sorts of organizations such as Ku Klux Klan, labor unions, religious organ-

izations, churches or fraternal orders. Among the late cases cited in the supplementary notes of C. J. S. are the cases of *Johnson v. State* (Alabama), 54 So. (2d), 84; *State* v. *Musser* (Utah), 175 Pac. (2d), 724, 333 U.S., 95, 92 L. ed., 562; and *Sorrentino v. State* (Arkansas), 214 S. W. (2d), 547; *American Creosote Works of La.* v. *Harp* (Mississippi), 60 So. (2d), 514, 35 A. L. R., (2d), 603; *State* v. *Greer* (West Virginia), 42 S.E. (2d), 719.

Counsel cites specifically also a case involving a labor union, *Alabama Fuel and Iron Co. v. Pawaski*, 232 Ala., 66, 166 So., 782.

Since none of these prospective jurors who were challenged were either present or former employees of the telephone company, nor were they connected with it, nor were they members of the union to which the telephone employees belong and since no bias or prejudice was claimed as to any of them, it was error to sustain the challenge for cause.

[fol. 527] The State was granted twenty-four (24) preemptory challenges, as provided by the statute. If used thirteen (13) of same so that with the fourteen (14) that were erroneously allowed for cause the State was in effect allowed three (3) additional preemptory challenges.

Counsel cites *Vines* v. *State*, 190 Tenn., 644, 647 for the proposition that the allowance of even one (1) additional preemptory challenge by the State is necessarily prejudicial as a matter of law.

We think the facts of that case present an entirely different picture from what we have in the instant case. In the *Vines* case it was perfectly apparent that the accused did not have a fair trial for several reasons. One was that the accused was a negro man who was charged with an assault to commit murder on the person of a white woman, whereas the argument of the counsel for the State interjected into the case the theory of attempted rape; secondly the remarks of the Attorney General were highly inflamatory and prejudicial to the defendant; third the qualified juror excluded by the allowance of the extra preemptory challenge was a man of the same race as the accused.

In the instant case we have an entirely different situation. There is no question raised anywhere in the record that the jury that tried these men was not composed of fair and

[fol. 528] impartial jurors. Not a suggestion of a complaint is made anywhere in the record in that regard. Secondly, by the prompt and speedy action of the law enforcement officers these two defendants were apprehended very shortly after the commission of the offense, very convincing circumstantial evidence with the assistance of the F. B. I. independent of the confessions was obtained against them, each one admitted that they were together on the night and early morning of the occurrence of these explosions when they made their original statements to the Attorney General in which they denied all knowledge or participation in the occurrences, as a result of all of which it can readily be seen that they were nor prejudiced by either one of the above errors on the part of the court in its rulings.

This Court throughout its ruling ever since the enactment of the harmless error statute in the year 1911, Section 10654 of the 1932 Code, has held that it must affirmatively appear from an examination of the entire record that any errors committed in the trial court prejudicially affected the verdict.

In Mahon v. State, 127 Tenn., 535, it was held that where the guilt of the defendant was evident a judgment would not be reversed because the trial court erroneously held the jurors competent, it appearing that the parties were tried by a fair and impartial jury.

[fol. 529] In *Manning* v. *State*, 155 Tenn., 266, it was said: "The question to be considered on appeal is whether or not defendant was denied a fair and impartial trial by a fair and impartial jury as at common law". In this case it appears that such was the case.

In *Cooley* v. *State*, 174 Tenn., 168, the defendant's request prior to the selection of the jury for a list of the prospective jurors, a right to which he was entitled by statute, was denied him. It was held that having had a fair and impartial trial, he could not complain of this error.

The same thing is repeated in *Long* v. *State*, 187 Tenn., 139.

In *England* v. *State*, 196 Tenn., where a juror who had previously been challenged preemptorily was accepted without discovering his prior disqualifications, the Court held there was no error that would justify reversal because

he had a fair and impartial trial within the meaning of the statute.

In addition to the circumstantial evidence above referred to we thing the confessions were properly admitted in evidence by the trial judge, that they received a fair and impartial trial, and that the record shows guilt beyond a reasonable doubt. The errors occurring do not affirmatively appear to have prejudiced the defendants, and, therefore, within the spirit of the Act of 1911, the case will [fol. 530] not be reversed because of them. Said Act was necessitated by the frequent reversals for numerous errors because the State could with difficulty show that errors were not prejudicial—that is, prove a negative—and thus the expense of the courts was greatly increased by repeated new trials.

The judgment below is affirmed.

Joan E. Swepston, J.

[fol. 531] In the Supreme Court of Tennessee, at Knoxville, September Term 1955

No. 1 Knox County Criminal, Felony (Two Counts), Affirmed.

Gerald Wm. Nelson and John E. Hatton

vs.

The State

Judgment—July 20, 1956

Came the plaintiffs in error Gerald Wm. Nelson and John E. Hatton in proper person and by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof the Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that the plaintiffs in error, for their offense of Felony (Two Counts) be delivered to the Warden of the penitentiary, or his agent, and be by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor, for a term of not more than Three (3) years, and not less than Three (3) years each on each count to run consecutively, commencing on the day taken into custody by the Sheriff of Knox County being July 20, 1956.

It is further ordered by the Court that plaintiffs in error [fol. 532] be infamous and disqualified from holding any office under this State, or exercising the elective franchise, or giving evidence in the Courts of this State. The plaintiffs in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

(Signed) A. B. Neil, C. J., Alan M. Prewitt, Hamilton S. Burnett.

[fol. 533] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. —

[Title omitted]

STIPULATION AS TO THE RECORD

The parties to the above-entitled cause hereby stipulate that the following portions of the record should be included in the transcript transmitted to the Supreme Court:

1. Certified copies of the two indictments.

2. Certified copy of all testimony in the Transcript of the Record pertaining to the selection of the jury, including pages 13 to 27 of the Technical Record and pages 1 through 16 in the Bill of Exceptions.

3. All testimony in the original transcript before the Court pertaining to the admission of the petitioners' statements and the Court's rulings and comments thereon, including all statements by the Court pertaining to the [fol. 534] introduction of testimony by petitioners both before the Court and before the Jury and all objections and rulings thereon, including pages 277 through 380 in the Bill of Exceptions and also pages 423 through 711 in the Bill of Exceptions.

4. The verdict of the jury and judgment on same.

5. Motion for New Trial.

6. Assignments of Errors.

7. The Opinion and Judgment of the Supreme Court of the State of Tennessee.

8. This Stipulation.

(Signed) Hobart F. Atkins, Counsel for Petitioners.
Nat Tipton, Counsel for Respondent.

[fol. 535] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 536] Supreme Court of the United States, October Term, 1956

No. 271 Misc.

[Title omitted]

Order Allowing Certiorari and Granting Motion for Leave to Proceed in Forma Pauperis

On petition for writ of Certiorari to the Supreme Court of the State of Tennessee, Eastern District.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to

proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to the jury question. The case is transferred to the appellate docket as No. 636 and placed on the summary calendar.

December 17, 1956.

FILED
OCT 12 1957
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 56

GERALD WILLIAM NELSON and
JOHN E. HATTON,

Petitioners,

vs.

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 56

GERALD WILLIAM NELSON and
JOHN E. HATTON,

Petitioners,

vs.

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of Tennessee (R. pp. 53-61) is reported in 292 S.W. (2) 727.

Jurisdiction

The judgment of the Supreme Court of the State of Tennessee was entered July 20, 1956 (R. pp. 61-62).

Motion for leave to proceed in *forma pauperis* and petition for writ of certiorari filed September 14, 1956. Motion was granted (R. pp. 63-64). Certiorari granted, limited to the Jury question, December 17, 1956. The jurisdiction of this Court rests on the due process clause and the Fourteenth Amendment to the Constitution.

Question Presented

Whether the Supreme Court of the State of Tennessee erred in failing to reverse and remand this cause after finding as a fact that the State had erroneously been allowed to challenge for cause, some fourteen prospective jurors on the ground that they were or had been members of labor unions. The Supreme Court of Tennessee finding is on Record pages 58 and 59.

Statutes Involved

The Fifth and Sixth Amendments to the Constitution of the United States; Section 1, of the Fourteenth Amendment to the Constitution of the United States; Title 22, Volume IV, Tenn. Code Annotated Sections 22-101 and 22-106, providing the qualifications and exemptions of jurors; Article I, Section 6 of the Constitution of Tennessee, and Section 40-2510 Tennessee Code Annotated.

Amendment 5.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 22-101, Tennessee Code Annotated.

Basic qualifications.—Every person of the age of twenty-one (21) years, being a citizen of the United States, and a resident of the State of Tennessee, and of the county in which he or she may be summoned for

jury service for a period of twelve (12) months next preceding the date of such summons, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of the code. A woman shall have the option of serving or not when summoned to jury duty. (Code 1858, Sec. 4002, deriv. Acts 1809 (Sept.) ch. 119, sec. 2; 1835-1836, ch. 6, Sec. 8; impl. am. Acts 1867-1868, ch. 31, sec. 1; Shan., Sec. 5813; Code 1932, sec. 10006; Acts 1951, ch. 71, sec. 4.) Texts; History of a Lawsuit (7th Ed. Gilreath), secs. 323, 739; Law Reviews. Criminal Law and Procedure (W. D. Warren), 6 Vand. L. Rev. 1179. Jury Panels in Federal Courts, 22 Tenn. L. Rev. 203; Selecting a Trial Jury in Tenn., 22 Tenn. L. Rev. 220. Cited: Brewer v. Jacobs (1884), 22 Fed. 217.

Section 22-106, Tennessee Code Annotated.

Discharge of unqualified jurors.—The Court may discharge a grand or petit juror from service who does not possess the requisite qualifications, or who is exempt or disqualified from such service, or for any other reasonable or proper cause, to be judged of by the court. That a state of mind exists on his part toward law enforcement or which will prevent him from acting impartially, shall constitute such cause. (Code 1858, sec. 4007 Shan., Sec. 5818; mod. Code 1932, sec. 10012.) Law Reviews. Selecting A Trial Jury In Tenn., 22 Tenn. L. Rev. 22; Cited; Jenkins v. State (1897), 99 Tenn., 569, 42 S.W. 263; Turner v. State (1913), 128 Tenn., 27, 157 S.W. 67.

Article I, Sec. 6, Constitution of Tennessee.

That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

Section 40-2510, Tennessee Code Annotated.

Peremptory challenges.—In the trial of criminal cases, the peremptory challenges of jurors shall be as follows: In the trial of capital cases, the state shall be allowed six (6) for each defendant and each defendant shall be allowed fifteen (15) peremptory challenges. In the trial of all other felonies, the state shall be allowed for each defendant four (4) and each defendant shall have eight (8) peremptory challenges. In the trial of misdemeanors, the state for each defendant and each defendant shall be allowed three (3) peremptory challenges. (Acts 1909, ch. 545, sec. 1; Shan., secs. 5825, 5826; mod. Code 1932, Sec. 10020.)

Statement

The assignment of error pertaining to the manner of the Court's discharging qualified jurors for the sole reason that they were members of a union organization is found on Transcript of Record, pages 29-35.

This assignment of error was sustained by the Honorable Supreme Court of the State of Tennessee in its opinion (R. p. 59), but the Honorable Court held that this violation of petitioners' Constitutional and Statutory rights was harmless error (R. p. 60), and accordingly applied the harmless error statute, which is as follows:

Sec. 27-117, Tenn. Code Annotated—
Sec. 10654 of the Code of 1932.

No reversal or new trial for errors not affecting the results of the trial.—No verdict or judgment shall be set aside or new trial granted by any appellate court, in any civil or criminal cause, on the ground of error in the charge of the judge to the jury, or on account

> of the improper admission or rejection of evidence, or for error in acting on any pleading, demurrer, or indictment, or for any error in any procedure in the cause, unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial.

With the exception of the instant case, this Act has not been applied wherein fundamental or constitutional rights of the accused were involved. The following Tennessee cases hold: Errors affecting constitutional rights call for a reversal, and are not saved by the statute. *Munson* v. *State*, 141 Tenn. (14 Thomp.) 522, 213 S.W. 916; *Johnson* v. *State*, 152 Tenn. (25 Thomp.) 184, 274 S.W. 12, and cases cited: *Upchurch* v. *State*, 153 Tenn. (26 Thomp.) 198, 281 S.W. 462; *Northcross* v. *Loew's Memphis Theatre Co.*, 3 Tenn. App. 51

In its application of this statute, to this case, the Supreme Court of the State of Tennessee gave as its reasons for applying that this act is necessitated by the frequent reversal for numerous errors because the state could, with difficulty, show that errors were not prejudicial, that is, prove a negative and thus the expense of the courts was greatly increased by repeated new trials (R. p. 61).

Summary of Argument

That the petitioners' rights were violated in excluding from the jury panel fourteen (14) talesmen who were qualified under the law for jury service, their names having been drawn from the jury box and they having been summoned as jurors to try the case against petitioners. That it was error for the Court in the presence of all prospective

jurors to excuse the aforesaid fourteen solely and only because they were members of a labor union. This error was conceded as such by the state Supreme Court and it being further stated that the rule of law in Tennessee was that such error was of substance and called for a reversal. The Supreme Court of the State of Tennessee, however, without overruling its previous decisions, but for the purpose of this case, placed a different construction on the rights of these petitioners, denying them the equal protection of the law and due process of law as it has been defined in Tennessee:

The clear intention of the right is expressed in Section 40-2510 of the Code of Criminal Procedure, T.C.A. and it has been held to be reversible error since the statute was enacted to allow the State to exceed the number of peremptory challenges authorized by the statute. To hold otherwise against these petitioners certainly discriminates against them, whatever be the reason.

ARGUMENT

I

A Denial of Equal Protection of the Law in the Selection of a Trial Jury Is Within the Plain Meaning of the Words of the Statute and Violates Both the Federal and State Constitutions. No Rule of Statutory Construction Justifies a Disregard of the Obvious Purpose of the Legislative Act Which Prevents an Arbitrary Exercise of the Powers of Government.

The intentions and purposes expressed in the Fifth Amendment to the Constitution is that of equality, and the word "person" is not limited or restricted. There is no classification of guilty or not guilty, but is to be applied to all the citizens alike.

The Fourteenth Amendment to the Constitution of the United States forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances. *In re Kemmler* (1880), 136 U.S. 436, 34 L.Ed. 519, 10 Sup. Ct. 930.

In construing the Fourteenth Amendment, the Courts have held: This amendment does not impair the police powers of the State. *Slaughter-House Cases* (1873), 83 U.S. 36, 21 L.Ed. 394; *Barbier* v. *Connelly* (1885), 113 U.S. 27, 28 L.Ed. 923, 5 Sup. Ct. 357; *Powell* v. *Penna.* (1888), 127 U.S. 678, 32 L.Ed. 253, 8 Sup. Ct. 992, 1257; *Budd* v. *New York* (1892), 143 U.S. 517, 36 L.Ed. 247, 12 S.Ct. 930.

Due process of law and equal protection of the laws are secured if the law operates on all alike and does not subject the individual to an arbitrary exercise of the powers of government. *Duncan* v. *Missouri* (1894), 152 U.S. 377, 38 L.Ed. 485, 14 Sup. Ct. 570.

Rights guaranteed by this amendment are protected against state action whether action is by legislature, executive, judicial or administrative authority. *International Union of Mine, Mill and Smelter Workers* v. *Tennessee Copper Co.* (1940), 31 Fed. Supp. 1015.

Police power reserved to the state by Amendment 10 is subject to provisions of this amendment. *Gray* v. *University of Tennessee* (1951), 97 Fed. Supp. 463.

The prohibitions of this amendment extend to all acts of the state, whether through its legislative, executive or judicial authorities. *Scott* v. *McNeal* (1894), 154 U.S. 34, 38 L.Ed. 896; 14 Sup. Ct. 1108; *Pacific Gas Imp. Co.* v. *Ellert* (1894), 64 Fed. 421; *N. C. and St. L. Ry. Co.* v. *Taylor* (1898), 86 Fed. 168; *Huntington* v. *New York* (1902), 118 Fed. 683.

This amendment secures every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Sunday Lake Iron Co.* v. *Wakefield Tp.* (1918), 247 U.S. 350, 62 L.Ed. 1154, 38 Sup. Ct. 495.

This amendment prohibits the states from denying to any person within their jurisdiction the equal protection of the laws, but adds nothing to the rights of one citizen as against another. *United States* v. *Cruikshank* (1876), 92 U.S. 542, 23 L.Ed. 588.

Equal protection of the laws requires only that the same means and methods be employed impartially to the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. *Camden Fire Ins. Assn.* v. *Haston* (1925), 153 Tenn., 675, 284 S.W. 905.

The phrase "equal protection" requires that all persons shall be treated alike under like circumstances and conditions, both as to privileges conferred and as to liabilities imposed. *Mascari* v. *International Brotherhood (A. F. L.) Local Union No. 667* (1948), 187 Tenn., 345, 215 S.W. (2d) 779.

The rule of law with reference to and applicable to the facts in the instant case is found in 190 Tenn. Reports in the case of *Vines* v. *State* (being the third assignment of error). The Court's opinion by the Chief Justice with reference to the Court's excluding a qualified juror at a trial is as follows:

> The assignments of error which complain of the action of the trial judge in excluding one James Edwards from service on the jury and for permitting inflammatory remarks by the District Attorney Gen-

eral must be sustained. The juror, James Edwards, was a Negro. When he was called around and examined upon his voir dire the State had exhausted all its peremptory challenges. The juror stated he did not know the defendant or Mrs. Foster and had no opinion in the case. The Attorney General challenged him peremptorily. Thereupon, the trial judge remarked, "I don't think you have got any left. I think you have exhausted your challenges, General." Counsel for defendant, Mr. Denman, "We accept him." The Court: "The Court will excuse him. Excused by the Court." The defendant excepted. We think this action of the trial judge was clearly erroneous because it amounted to allowing the State an extra peremptory challenge, the juror being in all respects qualified to serve upon the jury. It was prejudicial to the right of the accused.

We are not unmindful of the fact that the trial courts have a wide discretion in passing upon the qualification of jurors in both civil and criminal cases. In exercising this discretion the presumption is always indulged that the court has but one purpose in mind, which is to assure a fair and impartial trial before an unprejudiced and competent jury. By Code Section 10012, it is provided that "the court may discharge a grand or petit juror from service who does not possess the requisite qualifications, or who is exempt or disqualified from such service, or for any other reasonable or proper cause, to be judged of by the court."

The basic requirement for jury service in Tennessee is that a venireman be a householder or freeholder in the county and State and "a good and lawful citizen." No contention is made here that Edwards was disqualified for any cause. If the trial judge could, upon his own motion, and without stating any cause, dis-

charge the juror he could arbitrarily discharge any number of venire-men who are qualified for service and by so doing add to the number of peremptory challenges by the State, in plain violation of law. The repetition and continuation of such a practice would result in an undisguised mockery of our system of jury trial. The defendant was entitled to have the juror in question occupy a seat in the jury box, and the court's action in excluding him without cause constitutes reversible error.

In one of the early criminal cases decided in 1878, by the Supreme Court of the State of Tennessee, the case of *Wiggins* v. *State*, reported in 69 Tennessee, page 736, the Court held:

> Challenges allowed the State.—In the trial of a criminal prosecution in which the peremptory challenges of jurors by the state is limited to four, it is error to allow the state to exceed that number although two defendants are being tried under the same indictment; where the juror thus challenged was accepted by the defendants and the defendants afterwards exhausted their challenges before the jury was obtained.

This rule of law has been strictly adhered to.

In another case, *Foutch* v. *State*, decided in 1898, and reported in 100 Tenn. Reports at page 335, in construing the statute with reference to peremptory challenges in criminal cases, the court held:

> It is reversible error to allow the state exceeding four peremptory challenges where the offense charged is not capital but of or above petit larceny. Citing Wiggins v. State, supra, and construing the Acts of 1875 and 1883.

Thus, the Honorable Supreme Court of the State of Tennessee was in error in allowing or calculating that the State was entitled to increase the number of peremptory challenges exercised by the State from thirteen (13) to twenty-seven (27), which includes the fourteen (14) jurors excused by the Court because they were members of labor organizations, at the instance of the state, and the thirteen (13) jurors that the State excused peremptorily without a reason and without cause.

There are a number of qualifications for a juror defined in the statutes of the State of Tennessee and this enumeration by statute of certain grounds for challenge for cause is further elaborated in allowing the Court judicial discretion, that is, in the judicial field as was practiced under the common law rule, and while the trial court's discretion in the matter is extensive, there is a limit upon which such discretion may not go. See 50 C.J.S. p. 946, Sec. 208(b) citing *State* v. *Rhodes*, 282 N.W. 540 superseded 288 N.W. 98, 227 Iowa, 332, Cert. denied; *Rhodes* v. *State of Iowa*, 60 S.Ct. 980, 310 U.S. 626; 84 L.Ed. 1398.

And the statutory discretion of the Trial Court with respect to the competency of a juror cannot be so exercised so as to change in any degree the essential qualifications of a juror. Quoting *Scrivner* v. *State*, 75 Pac. 2d 1154; 63 Okla. Crim. 418; Cited under section 208; 50 C.J.S. page 946, Sec. 208(b).

Section 229, C.J.S. Volume 50, 946 is as follows:

> Membership in Association, or Organization.—The fact that a person is a member of a particular order, association, or other organization does not, as a general rule, of itself render such person incompetent as a juror.
>
> Mere membership in a particular order or organization is not ground for challenge for cause and does not

render a member incompetent as a juror, at least where it is not shown that such order or organization is unlawful in its object or purpose, or that it is in some manner interested in or connected with the prosecution of the case at bar. E.g. Allen v. State, 23 P. 96, 28 Okla. Crim. 373; Thomas v. State, 272 S.W. 149, 100 Tex. Crim. 114; State v. Griffith, 279 S.W. 135, 311 Mo. 630; State v. Logan, 126 S.W. 2d 256, 344 Mo. 351; 122 A.L.R. 417; State v. Gartland, 263 S.W. 165; 304 Mo. 87; Stevens v. State, 276 S.W. 228, 101 Tex. Cr. 220; McCauley v. State, 9 S.W. 2d 236, 177 Ark. 1031; Rose v. Magio, 124 So. 296, 220 Ala. 120; State v. Griffith, 279 S.W. 135, 311 Mo. 630; State v. Lohm, 125 S.W. 758, 97 W.Va. 652.

Where no labor union was interested in result of former employee's action for assault and battery allegedly committed by employees, court's refusal to allow juror who was affiliated with union to be stricken for cause was not error. Alabama Fuel and Iron Co. v. Powaski, 166 So. 782, 232 Ala. 66.

Subject to qualification or limitation because of the existence of a pecuniary interest, under rules discussed, supra, sec. 215, as a general rule a person is not incompetent to act as a juror in a trial for a particular offense because he is a member of an association organized for the prosecution or prevention of such offenses, unless the association is in some manner connected with or interested in, the prosecution of the particular case or the juror is obligated to do all in his power to secure convictions: Carnaggio v. State, 109 So. 732, 143 Miss. 694, 35 C.J. page 332, note 23; Remus v. U. S., CCA, Ohio, 291 Fed. 501; 35 C.J. page 332, note 24; Counts v. State, 181 S.W. 723, 78 Tex. Cr. 410.

A juror is not incompetent merely because he and one of the parties are members of the same religious denomination, church, organization or fraternal order. Sebring v. Weaver, 42 Pa., Super. 588, 35 C.J. page 332, note 27; Searle v. Springfield Roman Catholic Bishop, 89 N.E. 809, 203 Mass. 493, 25 L.R.A. N.S. 992, 17 Ann. Cas. 340; 35 C.J. page 332, note 28; State v. Dunn, 109 So. 56; 161 La. 532; Dunn v. State of Louisiana, 47 S.Ct. 344, 273 U.S. 656, 744; 71 L.Ed. 825; Jones v. Wright, Civ. App. 92 S.W. 1010; 35 C.J. page 332, note 29; Reed v. Peacock, 82 N.W. 53, 123 Mich. 244; 81 Am. S.R. 194, 49 L.R.A. 423; 35 C.J. page 332, note 30; Purple v. Horton, 13 Wend. 9, 27 Am. D. 167; 35 C.J. page 332, note 31.

Affiliation with a political party constitutes neither a qualification nor a disqualification for jury service. On an election contest a juror cannot be challenged for cause because he belongs to a particular political party, or voted against one of the contesting parties. State v. McGee, 83 S.W. 2d 98; 336 Mo. 1082; Gray v. State, 49 S.W. 699, 19 Tex. Civ. App. 521.

In the matter of selecting a jury in a criminal action and due process of law, see Spies v. Ill., 123 U.S. 131; 31 L.Ed. 80; 8 S.Ct. 21-22.

Where persons are wrongfully excluded from service on trial jury by reason of race or color, see Carter v. Texas, 177 U.S. 442; 44 L.Ed. 839; 20 S.Ct. 687; Rogers v. Ala., 192 U.S. 226; 28 L.Ed. 417; 24 S.Ct. 257.

The phrase "equal protection of the law" is not susceptible of exact definition. If these must be decided upon the facts involved, the guiding principle most often stated by the courts is that the Constitutional guaranty requires that all persons shall be treated alike, under like circumstances and continues both in the privilege conferred and the liability imposed. Mas-

cari v. International Brotherhood of Teamsters, etc., 187 Tenn. (23 Beelr) 345; 215 S.W. 2d 779.

Section 40-2510 T.C.A. in its provision presages each statement of the number of peremptory challenges allowed by the word shall, thus legally fixing the number of peremptory challenges for each party in a criminal case.

"Shall" as used in statutes, contracts, or the like.—This word is generally imperative or mandatory. *McDunn* v. *Roundy*, 191 Iowa 976; 181 N.W. 453-454; *Bay State Ry. Co.* v. *City of Woburn*, 232 Mass. 201; 122 N.E. 268; *U. S.* v. *267 Twenty-dollar Gold Pieces*, 255 Fed. 217-218; *Baer* v. *Gore*, 79 W.Va. 50; 90 S.E. 530-531; L.R.A. 1917 B. 723.

In common or ordinary parlance and in its ordinary significance the term "shall" is a word of command and one which has always or which must be given a compulsory meaning, as denoting obligation. It has the invariable significance of excluding the idea of discretion and if the significance of operation to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or when a public interest is involved, or where the public or persons for rights which ought to be exercised or enforced, unless a contrary intent appears. *People* v. *O'Rourke*, 124 Calif. Apps. 752; 13 Pac. 2d 989-992.

The reason for the rule is that the right is given to the defendants, although they may be tried together, yet the judgments may be different. Each defendant is on trial and must stand or fall ordinarily as if tried alone. It is only the natural and reasonable construction of the statute to hold that every defendant should have the benefit of its provisions.

By the Constitution of the United States, Sixth Amendment, the accused was entitled to a trial by an impartial

jury. A juror to be impartial, must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt. 155 B.

He further says that a principal cause of challenge is "so-called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers." *Id.* 156 B.

Or, as stated in Bacon's Abridgement, "It is grounded on such a manifest presumption of partiality, that if found to be true, it unquestionably sets aside the juror or jurors." Bac. Abr.; Tit. Juries, E. 1.

If the truth of the matter alleged is admitted, the law pronounces the judgment, but if denied, it must be made out by proof to the satisfaction of the court or the triers. *Id.* E. 12.

To make out the existence of the fact, the juror who is challenged may be examined on his *voir dire* and ask any question that does not tend to his infamy or disgrace.

A peremptory challenge is an objection to a juror for which no reason need be given and upon which the Court must exclude him. There is not and cannot be any question "of good cause" about this challenge.

For a defendant to take advantage of an error in the exercise of a peremptory challenge it is necessary that his right to peremptory challenge has been exhausted. See *Hopt* v. *Utah*, 120 U.S. 430; 7 Supreme Court, 614; 30 L.Ed. 708; *Needham* v. *U. S.*, 73 Fed. 2d 1.

In this cause the petitioners exhausted their challenges. Exceptions were duly made and entered. The points were relied on for appeal, and the appellate court agreed that the challenge of the fourteen prospective jurors by the State was error, yet, by its decision, discriminated against

the petitioners and against all union men by refusing them the privileges of all other citizens of the state, in the matter of jury service, and of all other defendants of the state who were union members in the matter of selecting a jury for the purpose of a trial of a criminal case, either in the matter of the reason given by the Court at the trial as being for cause, that is, that any member of any labor organization was *per se* disqualified to sit as an impartial juror in the trial of a case in any way connected with a labor dispute, even though the prospective juror was qualified according to the law of the case, or that those fourteen jurors unlawfully discharged, be charged as peremptory challenges, then and in that event, the state is allowed to exceed its peremptory challenges by three or more which has always been held to be a reversible error in criminal trials in the State of Tennessee as heretofore set out. See *Vines* v. *State; Wiggins* v. *State* and *Foutch* v. *State, supra.*

Thus, this holding denied the petitioners equal protection of state laws and of Federal Laws, to which they were entitled. See *Lucy, et al.* v. *Adams*, 350 U.S. 1, 76 S.Ct. 33. This denial of equality under the law is in violation of the statutes and the Constitution of the State of Tennessee and the Constitution of the United States.

II

Historical Background of the Right of Impaneling of the Jury Demonstrates the Purposes, Rights and Rules Pertaining to the Selection of Jurors and the Prohibitions of Violating Those Rights.

By our national Constitution the trial of all crimes excepting cases of impeachment shall be by jury. No person shall * * * be deprived of life, liberty or property without due process of law. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial by an impartial jury. Doubtless these provisions operate co-extensively with the national jurisdiction.

The provision requiring due process of law was in 1868, extended by an amendment to bind the states. This provision already is in the Constitution of the State of Tennessee and in criminal cases, by all opinions, it secures to defendants, as did the like words in Magna Carta, those fundamental rights of trial which previous usage has established.

Since both the national and state constitutions and the state law of Tennessee, including the interpretations of the law applicable are to be interpreted together, the only construction giving effect to these provisions of the Constitution is that the rights pertaining to the qualifications, etc., of petit jurors are fundamental rights.

Under the subject, "qualifications of jurors" there has been catalogued in Tennessee, the following rules:

1. Freedom from bias of near relationship. This relation, either by affinity or consanguinity.

2. Bias because of other civil and social connections.

3. A general bias for or against a prisoner.

4. That the juror has a pecuniary interest in the result of the cause.

5. Bias as to the prisoner's guilt.

6. The juror having already in some other capacity, passed upon the question involved.

7. Bias from views of the law, that is, biased against the particular crime or that it was not a crime to do the thing charged, or a juror would be incompetent under this rule who would not convict or render a verdict on circumstantial evidence, etc.

8. The juror's connection with the prosecution or defense of a like offense.

9. The technical qualifications required by the state statutes that he not be a practicing attorney, etc.

10. Qualifications of freehold and the like. The Tennessee rules is that he must be a householder or a free-holder.

11. Residence in the County and State. He must be a citizen of the state and county for twelve months before service by statute.

12. Alienage. This is removed in Tennessee by naturalization.

13. Infamy.

14. Want of mental capacity and the like, including deafness, blindness, etc.

15. Personal exemption. Minister of Gospel, Doctors, the aged, and certain professional men.

The law, to be effectual, must consider that jurors are men with the common imperfections of mankind. A purified understanding and mental capacity that moves with the evidence but not otherwise. The common law rule as defined and set out in the statutes and our Constitutions must be interpreted in the light of these facts, and a disqualification of bias to prevail must be of some standard magnitude dictated by some practical system. To seek a jury of perfect men would be to seek an impossible jury which would, in effect, be simply to forbid the wheels of justice to move.

The impaneling of the trial juror in Tennessee is from a list embodying the names of the jurors kept in a jury box by a jury commission in each county and from this jury

box the panel is drawn by the Court. Each juror who is listed as a venireman is interrogated by the Court as to his legal and lawful qualifications, under oath on the *voir dire*.

If the Court ascertains in this examination that the juror is qualified under the law, the juror is then tendered first to the state for questionin, and then when passed by the state, to the defense for questioning. This was the procedure followed by the Court in the case at bar. There are two kinds of means of challenge available to each litigant, one being a challenge for cause, that is that the prospective juror in answering questions propounded, indicated by his statement, incompetence or disqualifications that would prevent him from being a legal juror. There is no limit as to the number of jurors purged from the panel by this means. The other method of challenging under the state practice, is that of peremptory challenge.

A peremptory challenge is one which the law accepts without any reason given. In this cause, there were three defendants and the state was allowed eight (8) peremptory challenges for each defendant, making a total of twenty-four (24) and the defendants were allowed twelve peremptory challenges for each of them, making a total of thirty-six (36) challenges. The defendants-petitioners, Nelson and Hatton, exhausted their peremptory challenges. The State used thirteen of its peremptory challenges and the Court, upon motion of the State for challenge for cause because they were members of a labor union, excused fourteen (14) otherwise qualified jurors because they were members of labor unions.

The state, altogether, was allowed and did challenge twenty-seven jurors without a justifiable reason, that is, peremptorily, though all of the jury selected to try the cause knew of the court's attitude toward members of labor

unions, because under Tennessee law, the jury must be present in the court room at all times while selections are being made.

By the Ancient Common Law, "the king might challenge peremptorily as many as he thought fit, of any jury returned to try any cause in which he was a party." Later, in 1305, this was changed by 33 Edw. 1, stat. 4. It provided that in all "inquests" before the courts, "wherein our lord the king is party," though it should be alleged on behalf of the king "that the jurors of those inquests or some of them be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court." 2 Hawkins P.C., c. 43, Sec. 2; U. S. v. Douglass, 2 Blatch. 207.

This would seem to end peremptory challenges, but the Courts by construction, leaning to the Crown, rendered this statute almost nugatory. Thus, on a challenge from the king "before a panel is perused," says Hawkins, no cause for it need be shown "till the whole panel be gone through and it appear that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge" "touts paravaile," he "shall be first put to show all his causes of challenge before the king need to show any." 2 Hawk. P.C., c. 43, sec. 3. Hence the practice, transmitted to us as common law.

Under the statute, peremptory challenge of jurors in Tennessee is limited, but is permitted in compensation for the abolished right of passing, standing aside, and challenge

as existed at common law, and there is a balance provided for by the statute in allowing defendants to peremptorily challenge a limited number of jurors. This right of challenge having been permitted at common law, is now available by statute in all trials for criminal offense. Though originally it was admitted only in favor of life, it is now available under the statute in all felonies, though the punishment is not death. The number and to a considerable extent, the right itself is regulated by the statutes.

> If the court wrongly overrules a prisoner's challenge for cause, and then he challenges peremptorily the obnoxious juror, who thereby is in fact excluded, the wrong has done him no injury and he is entitled to no redress if, when the trial panel is fully made up, he has peremptory challenges remaining unused. Citing a long list of cases in Bishop's New Criminal Procedure, Vol. 2, page 742, sec. 943. The rule is otherwise if his right of peremptory challenges has been diminished.

In this cause, there were two cases tried together and the petitioners, Nelson and Hatton, had exhausted their peremptory challenges (R. p. 17).

If the statute provides that the court may do thus and so, then there is always a conditioned application of the statute, but if the statute or constitutional provision is that the governmental agency shall or shall not do thus and so, then the statute or constitutional provision is mandatory and the court does not have discretion in the application of this rule of law thus defined.

While the formal history of those provisions of the Constitution and of the Legislative Acts in aid of the Constitutional rights invested in the matter of the trial by jury, the matter of challenge peremptorily being one of the laws

designed to aid each side alike to have a choice in the selection of a jury, the statute recognizes an equality to be followed in its execution. This must be if the purposes of a jury trial are to be carried through. This is a matter that concerns every citizen, and there can be no other conclusion than that the jury that tried this case was not selected fairly, legally and constitutionally. If the trial judge in this cause could exclude all members of a labor union, another judge could just as justifiably excuse all persons that were non-union members from sitting as trial jurors, and trial by jury would be meaningless. We submit, therefore, that the history of these Constitutional enactments and the legislation made for the purpose of carrying out the Constitutional provisions, like the plain wording in the Constitution, demonstrates an unequivocal purpose to prevent any encroachment whatever upon the citizens' rights in keeping inviolate the principal purposes expressed in the Constitution in the matter of selecting a fair and impartial jury.

The purpose the court below having always found and given effect heretofore, in this case, for an unsubstantial reason instead recognized the costs of a criminal trial below, and though having found that petitioners' rights had been violated, then the courts proceeded to nullify it by a wholly unwarranted resort to an inapplicable statute and an unwarranted and unreasonable construction of the Constitutional and statutory rights involved.

But the sole purpose of these Constitutional provisions and of the Legislative Acts in aid of these amendments, is to achieve the Constitutional and Legislative intent, and not to circumvent or frustrate it. The mechanical application of these rules as has been adhered to heretofore was in conformity with and not in opposition to the plain legal, constitutional and legislative intent. To hold otherwise

solely for the purpose of discrimination against these petitioners who happened to be laboring men and members of a labor union themselves is clearly a perversion of that purpose, the honorable trial Court having held that a member of any union, including hod-carriers or whatever, would be disqualified to sit as a trial juror (R. p. 32).

The Supreme Court of the State of Tennessee, therefore, should have reversed the trial court and found reversible errors upon the grounds assigned under Article I of the Assignments of Error. The Assignments, Brief and Argument presented, pertaining to the selection of the trial jury, are found on Record pages 29 through 35.

> The trial by jury has been considered in England and America as the most distinguishing badge of liberty. Bank of the State v. Cooper, 10 Tenn. 599.
>
> It is a fundamental guarantee of the rights and liberties of the people and is passed to us as the birthright of every free man. Dimick v. Schiedt, 293 U.S. 474, 1935.
>
> It was known and used in some form by the ancient Greeks but the forerunner of the jury system as we know it, was introduced into England by the Normans and was used principally by the early Kings as a quasi-administrative body. Gradually the jury developed from a body of informers or citizens from the neighborhood into what is supposed to be a body of twelve good and lawful men who stand wholly indifferent and impartial, to try the issues of fact according to the law and the evidence. Turner v. State, 128 Tenn., page 27.
>
> While the Federal Constitution is concerned with the guarantee of a trial by jury in the Federal Courts and does not at any place expressly guarantee the right of trial by jury in State Courts (Dimick v. Schiedt, 239 U.S. 74), the Fourteenth Amendment to

the Constitution supplies protections and safeguards where the right to trial by jury remains secure under state law.

CONCLUSION

For reasons heretofore stated in this brief, it is respectfully submitted that the judgment of the Supreme Court of the State of Tennessee admittedly based upon a finding of fact set out in the Supreme Court's opinion, is erroneous in law, is prejudicial and does not afford these petitioners due process of law and equality in the administration of the law and should be reversed.

Respectfully submitted,

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October 12, 1957.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

SUPREME COURT NO. ~~65~~ 56

GERALD WILLIAM NELSON and
JOHN E. HATTON,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of Tennessee.

REPLY BRIEF

On Behalf of the Respondent Limited to the Jury Question.

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On Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of Tennessee.

REPLY BRIEF

On Behalf of the Respondent Limited to the Jury Question.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

The petitioners, Nelson and Hatton, were indicted and convicted for damaging or destroying real property with explosives in the Criminal Court of Knox County, Tennessee. Section 39-1401, Tennessee Code Annotated.* Each was sentenced to be confined in the State Penitentiary

* Tennessee Code Annotated, 1955. The first number represents the title, and the second, the section in Tennessee Code Annotated. (See Appendix A for the text of the statute.)

for a period of three (3) years (R. 11). Assigning errors, they duly perfected their appeals to the Supreme Court of Tennessee, where, according to its opinion, only two assignments were presented (R. 11-15, 55). In disposing of the two assignments of error, the State's highest Court held that:

> (a) The pre-trial statements or confessions of the petitioners were properly admitted in evidence; and
>
> (b) The trial court did not commit reversible error by allowing the State to challenge for cause prospective jurors who were members of labor unions (R. 53-61).

The first proposition is not before this Court. As to the latter, the State's highest tribunal held that the State was entitled to twenty-four (24) peremptory challenges as distinguished from any number of challenges for legal cause. Thirteen (13) peremptory challenges were used for undisclosed reasons by the State, leaving eleven (11) additional ones unused. While empanelling the jury, the trial court permitted the State to challenge fourteen (14) prospective jurors for cause because they were members of labor unions. The Court reasoned that the effect of the trial court's action was to grant the State three (3) peremptory challenges in addition to those allowed by statute. Although the action of the trial court was found to be erroneous, the State Supreme Court refused to reverse the cause because it concluded that the petitioners received a fair and impartial jury trial (R. 58-61).

As to the other facts relevant to the case, the State relies upon the recitation of facts contained in the opinion of the Supreme Court of Tennessee (R. 53-55).

In granting the petition for the writ of certiorari to the Supreme Court of Tennessee, this Court limited the writ to the jury question. **Nelson v. State of Tennessee** (1957), ... U. S. ..., 77 S. Ct. 328 (R. 63).

JURISDICTION.

The jurisdictional statements in both the petition for certiorari and the brief in support of it are inadequate.

The petitioners insist that this Court is clothed with jurisdiction under Title 28, Section 1257 (3), U. S. C. A. (Petition for Certiorari, p. 2; Petitioners' Brief, p. 1).

In their brief, the petitioners make the following jurisdictional allegations:

> "The judgment of the Supreme Court of the State of Tennessee was entered July 20, 1956 (R. pp. 61-62):
>
> "Motion for leave to proceed in forma pauperis and petition for certiorari filed September 14, 1956. Motion was granted (R. pp. 63-64). Certiorari granted, limited to the jury question, December 17, 1956. The jurisdiction of this Court rests upon the due process clause and the Fourteenth Amendment to the Constitution" (Petitioners' Brief, pp. 1-2).

For a number of reasons, this jurisdictional statement is inadequate.

1. There is nothing in the record, the petition for certiorari, or the petitioners' brief indicating that the question of whether the petitioners were denied their constitutional rights under the Fourteenth Amendment on the jury issue were considered or decided (a) by the Criminal Court of Knox County, Tennessee, or (b) by the Supreme Court of Tennessee. Under the Tennessee practice, it was necessary for the petitioners to file a motion for a new trial setting forth the various errors allegedly committed by the trial court. The motion for a new trial was seasonably made and it complains of the action of the trial court in permitting the State to challenge for cause the persons summoned for jury duty who were members of labor unions. Allegedly, this was error, violating Article I, Section 6, Constitution of Tennessee. No reference was made to the

Fourteenth Amendment in the motion for a new trial in the trial court as to empanelling the jury (R. 12). It was necessary for this question to be raised in the motion for a new trial so that it might be considered by the trial court. **Webb v. State**, 173 Tenn. 518, 519, 121 S. W. 2d 550. Neither do the assignments of error presented to the Supreme Court of Tennessee contain an assignment with reference to this proposition (R. 29-35). If the proposition had been submitted to the Supreme Court of Tennessee, it might have been considered by that Court, although it was not assigned as error. **Thompson v. State**, 190 Tenn. 492, 230 S. W. 2d 977. However, since the proposition is not mentioned in the opinion of the Supreme Court of Tennessee, the assumption is warranted that a substantial Federal question on the jury issue under the Fourteenth Amendment was not presented to the State courts. **Mutual Life Insurance Company v. McGrew**, 188 U. S. 291, 309, 23 S. Ct. 375.

The State submits that it is manifestly unfair to the trial court and the Supreme Court of Tennessee to allow the petitioners to raise constitutional issues under the Fourteenth Amendment with reference to empanelling the jury for the first time in this Court. **Hulbert v. Chicago**, 202 U. S. 275, 26 S. Ct. 617; **Honeyman v. Hanan**, 300 U. S. 14, 18, 57 S. Ct. 350, 8 L. Ed. 476.

This case should be distinguished from those where persons unlearned in the law have attempted to protect their rights by preparing their own defenses in the trial courts and on appeal. In the State courts the petitioners were represented by able and experienced counsel. Neither is this a habeas corpus proceeding in which a prisoner unwittingly cited the Sixth Amendment instead of the Fourteenth Amendment, as in **Gibbs v. Burk**, 337 U. S. 773, 779, 69 S. Ct. 1251.

2. If the State is correct as to (1) above, it follows that a substantial Federal question has not been presented and

the general statements in the petitioners' brief, as to a judgment having been entered by the Supreme Court of Tennessee, and as to certiorari having been granted by this Court limited to the jury question, are too vague, indefinite, and generalized to show jurisdiction in this Court. Rule 40 (b), Supreme Court of the United States, Revised Rules.

3. In addition, if the Court is of the opinion that the jurisdictional grounds stated in the petition for certiorari should be considered, it is appropriate to point out that there the petitioners relied entirely upon the third assignment of error presented to the Supreme Court of Tennessee (Petition for Certiorari, p. 2). That assignment of error complained about the admission of confessions or statements of the petitioners which were alleged to have been obtained in a manner contrary to the "bill of rights" and the Fifth and Fourteenth Amendments. Clearly, the jurisdictional statement does not show that a Federal question was raised as to the "jury question." Indeed, the jurisdictional statement is completely silent as to the "jury question" and, therefore, does not and could not state, present, nor define a substantial Federal question on the jury issue.

4. Finally, it should be noted that the Supreme Court of Tennessee construed the State's harmless error statute as establishing a legislative policy which, under the circumstances of the case, overrode the State's legislative policy with reference to peremptory challenges. The petitioners have failed to challenge the application of the harmless error statute under the Federal Constitution. In considering the "jury question," the State contends that this Court of necessity must decide whether the State Courts' construction of the harmless error statute amounts to an unconstitutional application of the statute depriving the petitioners of a substantial Federal right. Thus, it would appear necessary for the petitioners to challenge the constitutionality of the application of the harmless

error statute in the State Courts. Having failed to do so, the proposition should not be considered in this Court.

In the early case of **F. G. Oxley Stave Company v. Butler County**, 166 U. S. 48, 655, 17 S. Ct. 709, 41 L. Ed. 1149, this Court, in discussing whether a right claimed under a treaty could be asserted when the question was first presented to the state supreme court on a petition to rehear which was overruled, observed that the jurisdictional averments respecting substantial Federal rights cannot be the subject of inference.

Hence, the failure of the petitioners to allege a substantial Federal question, on the jury issue as required by the law and the rules of this Court, is fatal, and the writ should be dismissed.

QUESTIONS PRESENTED.

Since the State insists that this Court is without jurisdiction, this subject was partially discussed under the heading "Jurisdiction".

After reviewing the record, the petition for certiorari, and the brief on the jury question, it seems that two questions control the merits of this controversy.

First, were the petitioners denied a fair jury trial within the meaning of Article I, Section 6, Constitution of Tennessee, by the action of the trial court in allowing the State to challenge for cause all prospective jurors who were members of labor unions?

Second, under the Fourteenth Amendment, is it permissible for a state court to construe its harmless error statute as curing error where the prosecution is allowed to exceed the number of peremptory challenges authorized by state statute, because the state was allowed to challenge prospective jurors who were members of labor unions for cause?

STATUTES INVOLVED.

The basic qualifications of jurors are contained in Section 22-101, Tennessee Code Annotated.* The State statutes also provide that various classes of persons are not qualified for jury service, certain persons are exempt, others are excused, and others may be disqualified. Sections 22-102-105, Tennessee Code Annotated.* A grand or petit juror may be discharged for reasonable or proper cause if he does not possess the requisite qualifications or if his state of mind will prevent him from acting impartially. Section 22-106, Tennessee Code Annotated.* Any woman may be excused by notifying the Court that she does not desire to serve as a juror. Section 22-108, Tennessee Code Annotated.*

Any person who does not possess the qualifications set out in the Code Sections may be challenged for cause. Section 22-301, Tennessee Code Annotated.* Either party may challenge for cause litigants with causes pending in court or persons who have served on a jury at a term during the two years next preceding.

In this case, no insistence is made that the jurors who were summoned for jury duty were discharged for any of the statutory reasons.

In addition to unlimited challenges for cause, either party is entitled to peremptory challenges under Section 40-2510, Tennessee Code Annotated (copied in Appendix C).

Tennessee's harmless error statutes are Sections 27-116 and 117, Tennessee Code Annotated (copied in Appendix D). The latter was applied by the State Court in this case.

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* These Code sections are copied in Appendix B.

SUMMARY OF ARGUMENT.

(1) This Court is without jurisdiction because the petitioners did not raise a substantial federal question on the jury issue in the State Courts, nor have they alleged a substantial federal question in this Court.

(2) The case was decided in the State Court on an adequate nonfederal ground. In the State Court it was insisted that the action of the trial court, on allowing the State to challenge for cause prospective jurors who were members of labor unions, violated Article I, Section 6, Constitution of Tennessee. No contention was made that a federal constitutional right was involved. The State Court held that the State Constitution guaranteed a fair and impartial jury trial which the petitioners had received. The construction of the State Constitution by the State Court is final and cannot be reviewed by this Court.

(3) There was no violation of the Fourteenth Amendment. The petitioners received a real trial, not a sham. The State has a broad discretion in administering its jury system which may even be abolished at its pleasure. Accordingly, if an accused is tried by a fair and impartial jury no fundamental right is invaded, nor has due process been denied if there was a real trial. Equal protection under the laws does not require a state to administer every state statute on the basis of absolute equality.

In weighing the statutes concerning harmless error and peremptory challenges, the rights of the petitioners were carefully considered, indicating that the State Court did not act unreasonably nor arbitrarily. It decided that the petitioners were afforded a fair and impartial jury trial, and, therefore, it was proper to apply the harmless error statute.

The cases, approving dual jury systems with unequal peremptory challenges allowed in a single state and ap-

proving the exclusion of certain classes of persons from jury service by statute, appear to present stronger arguments than the instant case that equal protection was denied.

Finally, the burden is on the petitioners to show how their rights have been adversely affected. No contention is made here that they suffered injury at the hands of the jury. Since the jury which tried them was fair and impartial, they cannot be heard to complain.

ARGUMENT.

The Opinion of the State Court Rests Upon an Adequate and Independent Nonfederal Ground.

As to the "jury question," the assignments of error urged upon the Supreme Court of Tennessee charged that the trial court violated Article I, Section 6, Constitution of Tennessee, by allowing the State to challenge for cause prospective jurors. The Section provides:

> "That the right of trial by jury shall remain inviolate and no religious or political test shall ever be required as a qualification for jurors." Article I, Section 6, Constitution of Tennessee.

The opinion of the State Court does not discuss by name this Section of the State Constitution. However, the cases cited and deemed by the Court to control the case at bar contain discussions of the requirements of Section 6, Article I.

In keeping with the prior decisions of **Mahon v. State**, 127 Tenn. 535, 548, 156 S. W. 458; **Manning v. State**, 155 Tenn. 266, 292 S. W. 451; **Cooley v. State**, 174 Tenn. 168, 174, 124 S. W. 2d 250; and **England v. State**, 196 Tenn. 186, 264 S. W. 2d 815, the State's highest tribunal in substance construed the State's constitutional provision, holding that the provision guaranteed a fair and impartial jury trial, and nothing more. The nature of the constitutional guaranty on the subject of selecting and rejecting jurors was summarized in **Manning v. State**, supra, as follows:

> "Article 1, Section 6, of the Constitution providing that jury trial shall remain inviolate protects the right as it existed at common law. **State v. Sexton**, 121

Tenn. 35. The Constitution assures a fair and impartial trial before a fair and impartial jury, but this does not mean blind adherence to useless forms—the reason for which lies in the forgotten past, and the necessity for which cannot be adapted to existing conditions.

"The right of challenge for cause was designed to exclude from the jury triers whose bias or prejudice rendered them unfit, and peremptory challenge was intended to exclude those suspected of bias or prejudice. Both rights of challenge were assured at common law, as procedural instruments for use to reject jurors as a means of obtaining an impartial jury, which is all that the common law proposed to give, and all that the fundamental law assures. The right to challenge is not the right to select a juror. If from those who remain after the right of rejection has been exercised, an impartial jury is obtained the traditional right of the accused is maintained."

The application of the foregoing to the instant case is obvious, and, clearly, demonstrates the fallacy of the argument that the State Constitution was violated.

In the Manning, Mallon, Cooley, and England cases, the harmless error statute was applied. In them, the Court held that Section 27-117, Tennessee Code Annotated,* forbids the reversal of causes where errors have been committed in the selection or rejection of jurors, provided the accused received a fair and impartial jury trial. Therefore, these cases and others decided by the Supreme Court of Tennessee support the Court's disposition of the case at bar. The petitioners cannot be heard to complain of the action of the State Court in construing the State Constitu-

* The harmless error statute codified the accepted rule of practice in the state Supreme Court. *Harness v. State* (1912), 126 Tenn. 365, 149 S. W. 911.

tion in conformity with its earlier decisions. Certainly, it cannot be successfully argued that a state constitutional right was denied.

The construction of the State Constitution is a problem for the State Court and is not a proper subject for review by this Court. In **Highland Farms Dairy, Incorporated, v. Agnew** (Va., 1937), 300 U. S. 608, 57 S. Ct. 549, the rule was stated:

> "A judgment by the highest court of the State as to the meaning and effect of its own Constitution is decisive and controlling everywhere."

In the Court below, the petitioners insisted that the allowance of one peremptory challenge in addition to those authorized by statute required a reversal under **Vines v. State**, 190 Tenn. 644, 231 S. W. 2d 332. The argument was rejected and the case was distinguished with the Court stating its reasons (R. 59). In addition, the cases of **Wiggins v. State**, 69 Tenn. 736, and **Foutch v. State**, 100 Tenn. 334, 45 S. W. 678, are relied upon as controlling the state law. In Wiggins, the Court held that under the statutes then in effect the state was entitled to four peremptory challenges irrespective of the number of defendants on trial. The Foutch case appears to be subject to the same objections as the Vines case, although it is not discussed in the state court's opinion. As to all of these cases, it should be stated that it was the function of the state court to determine and declare the state law. Having done so, the issue is foreclosed in this Court. **Black v. Cutter Laboratories** (1956), 351 U. S. 292, 76 S. Ct. 824.

Thus, it follows that the state decision rests upon an adequate and independent nonfederal ground and this Court is without jurisdiction of the cause, requiring a dismissal of the writ. **Black v. Cutter Laboratories**, supra;

Herb v. Pitcairn (Ill., 1945), 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789; **Enterprise Irrigating Dock v. Farmers' Mutual Canal Company**, 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644.

The Problems Under the Fourteenth Amendment.

The State's position is that the State Court reached the correct result on the "jury question" under the Fourteenth Amendment although the proposition was neither presented to nor considered by the State Court.

As indicated in stating the "questions involved," the Supreme Court of Tennessee was confronted with reconciling, if possible, two State statutes which the State's General Assembly had the power to enact. **Truax v. Corrigan** (1921), 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375. They equally declare the policy of the State. The first prescribes the number of peremptory challenges allowed parties to criminal proceedings.* Section 40-2510, Tennessee Code Annotated. The second provides that the appellate courts will not reverse causes for technical errors not affecting the result of trials. Section 27-117, Tennessee Code Annotated. The function of the Court was to give effect to two widely divergent legislative policies, if it could do so by protecting fundamental rights. Under Article I, Section 6, Constitution of Tennessee, the petitioners were entitled to a trial by a fair and impartial jury as a fundamental right. This they received so the Court concluded that the legislative policy relating to "harmless errors" should prevail.

The problem concerns the rejection instead of the selection of jurors. **Hayes v. State of Missouri** (1887), 120 U. S. 68, 7 S. Ct. 350; **Manning v. State**, supra.

* The state may fix by statute the number of peremptory challenges to which the parties are entitled. *Ashe v. United States ex rel. Valotta* (1926), 270 U. S. 424, 46 S. Ct. 333.

As to the argument of the applicability of the Fifth and Sixth Amendments, the State insists that they apply only to Federal Courts and not to the state courts. **Palko v. State of Connecticut** (1937), 320 U. S. 319, 58 S. Ct. 149. Therefore, no additional discussion appears necessary on these propositions. This Court has also held that the provisions of the Fourteenth Amendment with respect to jury trials do not prohibit the State from regulating and restricting them, since they are not encompassed within the immunities or privileges clause which the States are forbidden to abridge. **Maxwell v. Dow**, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597.

This leaves for consideration the applicability of the due process and equal protection clauses of the Fourteenth Amendment. This Court has considered a large number of situations concerning the selection of juries under the amendment. However, there are only a few instances in which the problem of rejection has been presented.

No case decided by this Court has been found which squarely decides the question at bar.

As a basic proposition, the State maintains that these petitioners cannot be heard to complain since they received a fair and impartial jury trial. This means that they were entitled to and received a real trial, and not a sham, as pointed out in the Palko case. It also means that they cannot demand anything more than an impartial jury. **Hayes v. State of Missouri** (1887), 120 U. S. 71, 7 S. Ct. 350; **Brown v. New Jersey** (1889), 175 U. S. 172, 20 S. Ct. 77. As observed by the late Mr. Justice Jackson in **Fay v. People of the State of New York**, 332 U. S. 261, 288, 67 S. Ct. 1613, ". . . They have no constitutional right to friends on the jury," and society is as much entitled to a fair trial as they. If the petitioners have reason to be-

lieve that the jury which tried them was more apt to convict, they have the burden of demonstrating to the Court that this was true. **Akins v. State of Texas** (1945), 325 U. S. 398, 400, 65 S. Ct. 1276. They have not only failed to assume the burden, but, by their silence, have indicated that the result of the trial would not have been different. Their claim, apparently, rests upon the proposition that the technical requirements of state statutes must be followed or there is a denial of due process. Such a position is patently unsound. In **Maxwell v. Dow**, supra, this Court asserted:

> "Trial by jury has never been affirmed to be a necessary requisite of due process of law." 176 U. S. 603.

The State further contends that the petitioners have been afforded equal protection of the laws under the Fourteenth Amendment.

The equal protection clause does not require that state statutes be administered with mathematical exactness. In this connection, in **Snowden v. Hughes** (1944), 321 U. S. 1, 8, 64 S. Ct. 397, in discussing alleged damages to civil rights, the Court declared:

> ". . . The insistence is rather that the Board, merely by failing to certify petitioner as a duly elected nominee, has denied to him a right conferred by state law and has thereby denied to him the equal protection of the laws secured by the Fourteenth Amendment.
>
> "But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. Where, as here, a statute requires official action discriminating

> between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.
>
> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

In other words, this Court has adopted the rule that every denial of a right conferred by state law does not involve a denial of equal protection. Unquestionably, the State's statutes involved here are fair on their face and there has not been a showing of intentional or purposeful discrimination. On the contrary, this is the only instance in which it is alleged that a trial court has permitted the State to reject prospective jurors for cause on account of their membership in labor unions, and, since the conduct of the trial court was disapproved by the State Supreme Court, such an error is not likely to recur.

The jury system in every state is the creature of the state. A state may or may not afford jury trial. **Maxwell v. Dow**, supra; **Palko v. State of Connecticut**, supra; **Sweezy v. State of New Hampshire** (1957), ... U. S. . . . , 77 S. Ct. 1203. Consequently, it would appear that the states have wide discretion in establishing and administering jury systems. 35 C. J., p. 360, Juries, Section 399. The Tennessee Court has not acted capriciously nor arbitrarily

in this matter, and it appears to have exercised reasonable discretion.

This Court has approved the practice of establishing two jury systems which may coexist in a single state, although different qualifications are prescribed for jurors and a different number of peremptory challenges are authorized as between the two systems. **Fay v. People of the State of New York**, supra; **Brown v. New Jersey**, supra. If the maintenance of separate jury systems, where each provides for a different number of peremptory challenges, may coexist in a single state under the equal protection clause, it seems that the case at bar presents an even stronger argument for the proposition that there has been no denial of equal protection.

In another situation, this Court found that there had not been a denial of equal protection where the names of negroes were not placed on the jury list in numbers in proportion to the total population. Since a purpose to discriminate, which may be proved by systematic exclusion, was not shown to exist, there was no denial of equal protection. **Akins v. State of Texas**, supra. This doctrine was announced by the Court, although the Congress had found it appropriate to implement the Fourteenth Amendment with legislation which granted redress in the Federal courts. The Akins case appears to be a stronger situation for applying the equal protection clause than the case at bar.

The legislative policy of excluding certain classes of people from jury service appears to be closely akin to this case. However, Mr. Justice Holmes, speaking for the Court, held that the Fourteenth Amendment was not violated by the legislature of Georgia which excluded certain classes of persons from jury duty. **Rawlins v. State of Georgia** (1906), 201 U. S. 638, 26 S. Ct. 560. He also observed that,

when persons liable to jury duty under state law are excluded; it is no ground for challenge to the array under the Fourteenth Amendment if a sufficient number of unexceptional persons were present.

As we understand these cases and the rules adopted by this Court, the equal protection clause does not require that every statute of every state shall be administered in every instance with absolute equality. The state courts must construe the various legislative enactments so as to harmoniously reconcile them, if possible, with the State and Federal Constitutions. In other words, there is no reason for any person to complain if he has received basic fairness and equal justice. Certainly, no argument has been advanced in this instance to show that the petitioners were treated unfairly or unjustly. Under these circumstances, a reversal of this case for a new trial by the State courts would appear to amount to nothing more than an idle ceremony, because the petitioners have not shown that their rights have been injuriously affected by the jury which tried them. The State court was not unmindful of the rights of the petitioners under the State Constitution and concluded that those rights were duly protected. Under such circumstances, the State Supreme Court did not act unreasonably nor arbitrarily in applying the harmless error statute.

It is persuasive that in a number of other states it is not reversible error for prospective jurors to be rejected for insufficient cause concerning qualifications so long as a fair and impartial jury is obtained. **Keady v. People**, 32 Col. 57, 74 Pac. 892, 66 L. R. A. 353; **Pittsburg etc. Railroad Co. v. Montgomery**, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; **State v. Huff**, 118 La. 194, 42 So. 771; **Bluthenthal v. May Advertising Co.**, 127 Md. 277, 96 Atl. 434; **State v. White**, 48 Ore. 416, 87 Pac. 137.

CONCLUSION.

In conclusion, the respondent respectfully insists that the writ should be dismissed for the reasons stated above and the judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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Certificate of Service.

The undersigned, a member of the bar of the Supreme Court of the United States and one of the counsel of record for the respondent, hereby certifies that on the ..... day of November, 1957, he served the within and foregoing reply brief upon the petitioners in the following manner as prescribed by Rule 33, Revised Rules of the Supreme Court of the United States: He deposited at the Post Office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing reply brief securely fastened in

an envelope, air mail postage duly prepaid, addressed to the following at his post office address as stated below, that is to say:

Honorable Hobart F. Atkins,
Attorney at Law,
410 Cumberland Avenue, S. W.,
Knoxville 2, Tennessee.

James M. Glasgow,
Assistant Attorney General.

APPENDIX A

Tennessee Code Annotated

39-1461. **Malicious injury to structures with explosives Penalty.** — Any person who willfully and maliciously damages or destroys any dwelling, business house, building, outhouse or any other structure, the property of himself or of another, by the use of dynamite or any other explosive, shall be deemed guilty of a felony, and upon conviction shall be punished by confinement in the state penitentiary for a period of time not less than one (1) year nor more than twenty-one (21) years.

APPENDIX B

Tennessee Code Annotated

22-101. **Basic qualifications.**—Every person of the age of twenty-one (21) years, being a citizen of the United States, and a resident of the state of Tennessee, and of the county in which he or she may be summoned for jury service for a period of twelve (12) months next preceding the date of such summons, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of the Code. A woman shall have the option of serving or not when summoned to jury duty.

22-102. **Incompetent persons.**—Persons convicted of certain infamous offenses, specially designated in this Code, persons of unsound mind, persons not in the full possession of the senses of hearing and seeing, and habitual drunkards, are incompetent to act as jurors.

22-103. **Occupational and disability exemptions.**—The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States, or of this state; all employees of the railway mail service; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or institution of learning; all members of fire companies; all persons over sixty-five (65) years of age, disabled by bodily infirmity, or specially exempted by any other positive law; all pharmacists registered under and in accordance with the laws of the state. Service in the national guard shall be accepted in lieu of all jury duty while actually in the military service of the state.

22-104. **Excuse from service.**—Any person may be excused from serving as a juror, when the state of his own health, or that of his family, requires his absence, or when,

for any reason, his own interests, or those of the public, will, in the opinion of the court, be materially injured by his attendance.

22-105. **Disqualification by interest or relationship.**—No person can act as a juror in any case in which he is interested, or when either of the parties is connected with him by affinity or consanguinity, within the sixth degree, computing by the civil law, except by consent of all the parties.

22-106. **Discharge of unqualified jurors.**—The court may discharge a grand or petit juror from service who does not possess the requisite qualifications, or who is exempt or disqualified from such service, or for any other reasonable or proper cause, to be judged of by the court. That a state of mind exist on his part toward law enforcement or which will prevent him from acting impartially, shall constitute such cause.

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22-108. **Women not desiring to serve as jurors may be excused.**—Any woman may, when summoned by an officer or otherwise, at that time state to said officer or notify the court by mail, that said woman does not desire to serve and she may thereby be excused from such service.

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22-301. **Challenge for general causes of incompetency.**—Either party to an action may challenge for cause any person presented as a petit juror, in either a civil or criminal proceeding, who is incompetent to act as a juror under the provisions of chapter 1 of this title.

APPENDIX C.

Tennessee Code Annotated

40-2510. **Peremptory challenges.**—In the trial of criminal cases, the peremptory challenges of jurors shall be as follows: In the trial of capital cases, the state shall be allowed six (6) for each defendant and each defendant shall be allowed fifteen (15) peremptory challenges. In the trial of all other felonies, the state shall be allowed for each defendant four (4) and each defendant shall have eight (8) peremptory challenges. In the trial of misdemeanors, the state for each defendant and each defendant shall be allowed three (3) peremptory challenges.

APPENDIX D.

Tennessee Code Annotated

27-116. **Reversal on merits.**—No judgment, decision, or decree of the inferior court shall be reversed in the appellate courts, unless for errors which affect the merits of the judgment, decision, or decree complained of.

27-117. **Technical errors affecting result.**—No verdict or judgment shall be set aside or new trial granted by any appellate court, in any civil or criminal cause, on the ground of error in the charge of the judge to the jury, or on account of the improper admission or rejection of evidence, or for error in acting on any pleading, demurrer, or indictment, or for any error in any procedure in the cause, unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial.